No. 8893

United States Circuit Court of Appeals

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For the Ninth Circuit.

CHARLES E. SCHMIDT, GEORGE LANDELL, Executor of E. A. LANDELL, Deceased, CLARENCE LOEBENTHAL, Trustee of Bernard Loebenthal, and WALTER L. HAEHNLEN Intervening Petitioners on behalf of themselves and other minority stockholders of the Northern Pacific Railroad Company,

Appellants,

vs.

UNITED STATES OF AMERICA and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, NORTHERN PACIFIC RAILROAD COMPANY, as Reorganized in 1875, NORTHWESTERN IMPROVEMENT COMPANY, a Corporation, BANKERS TRUST COMPANY, a Corporation, GUARANTY TRUST COMPANY, a Corporation, CITY BANK FARMERS TRUST COMPANY, a Corporation,

Appellees.

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In Two Volumes

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Pages 653 to 1288

Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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XXI.

Miscellaneous Sub-Divisions

1. Subdivision XIV.

It is alleged the purpose of Congress in chartering the Northern Pacific and granting to it lands was that all its properties should be used primarily to build a line of road and telegraph. That under certain contracts with the Oregon and Trans-Continental Company, and various branch line companies, the Northern Pacific dissipated its funds in the construction of branch lines, and that the contracts were collusive and fraudulent devices whereby the Oregon and Trans-Continental Company received illegal profits at the expense of the Northern Pacific. The argument is the transactions were ultra vires. This may be conceded, but the Government is not now seeking to restrain the company to the exercise of powers within its charter. The most that can be said is that at one time the Government might conceivably have had grounds to restrain the contracts denounced and to require the company on proper terms to relieve itself thereof. It is not argued that these contracts are now in existence or that anything illegal is now being done under them, or has been for many years. It is difficult to see therefore what remedy the Government can now have. It is said in argument that the contracts were fraudulent and intended to milk the Northern Pacific for the benefit of insiders in that company. If these charges were well pleaded it is not inquirable into in this case under plain, well settled principles,

declared by the Supreme Court in United States v. Union Pacific Railroad Company, 98 U. S. 569. The facts alleged can have no bearing [438] whatever in the adjustment of the land grant. It does not go either to the settlement of the grant or to what the company has earned thereunder.

I sustain the demurrer to this subdivision.

2. Subdivision XV.

It is alleged that large areas of the granted lands were diverted from the purpose intended by Congress in the grant and that they were not sold under bona fide contracts for the purpose of raising money in aid of the construction of the road.

For manifest reasons the demurrer to this subdivision is sustained.

3. Subdivision XXIX—A.

It is alleged that various patents were erroneously issued to the railroad company because the Land Department treated the lands as coming under the grant when, in fact, at the dates of the different locations they were within military or Indian reservations, and therefore excluded from the grant. Of course, indemnity selections in lieu of such losses might have been made.

To this subdivision a demurrer has been interposed and a plea of res judicata based upon United States v. Northern Pacific Railroad Company, et al. (N. P. Exhibit 23). An additional plea of res judicata is interposed as to lands within the Yakima Indian Reservation included in this subdivision

based on the case of United States v. Northern Pacific Railway Company, 227 U. S. 355.

Considering the plea of this case first, I think it cannot be questioned that it did thereby definitely adjudicate [439] as between the Government and the Railway Company the southern and western limits of the reservation. If these lands are outside those limits it certainly must be deemed as adjudicated that the patents to the railway company were not in error. I can find nothing in the record which enables me to determine that these lands are outside the reservation as established in this case, although counsel on both sides seem to admit it. It may be I have overlooked something. However, the result would not be changed.

For the reasons previously and several times stated I overrule both these pleas.

Again, I do not wish to be misunderstood. Some of these lands are admitted to have been erroneously patented. What effect will be given and what rights, if any, the Government may have in respect of such errors can be determined only on the final hearing. It may eventuate on the final adjustment that the doctrine expressed in United States v. Northern Pacific Railroad Company, et al. supra, may be applicable both as a principle of law and as an adjudication, and it may likewise turn out that United States v. Northern Pacific Railway Company, 227 U. S. 355, supra may be applicable as an adjudication. I am only holding now that I cannot determine these questions at this stage.

4. Subdivision XXX.

It alleges certain conclusions of the pleader as to the relief the United States is entitled to because of matters alleged in prior sub-divisions of the bill.

I do not see any possible place for it in the bill, nor do I see how either party is to be injured by its remaining [440] in or going out. The conclusions stated are either right, or wrong, and it makes not the slightest difference which. But as the question is raised I shall sustain the demurrer.

5. Subdivision XXXIII.

It is alleged that the railroad company was required by the Act of July 15, 1870 (16 Stat. 305) to re-imburse the United States for the cost of surveys within the grant and that prior to the decision in Northern Pacific Railroad Company v. Traill County, 115 U. S. 600, it refused to pay to the United States these costs. That case was decided December 7th, 1885. It is not alleged that the company did not ultimately pay the fees, but merely they were not paid until the Supreme Court had decided that company were required by the Act to make payment. I can see no possible effect the facts thus alleged have upon this case. No relief is sought, and patently none could be had. I sustain the demurrer to this sub-division.

6. Subdivision XXXIV.

I will overrule the demurrer to this sub-division. I do this solely because of the misunderstanding that has arisen between counsel as to whether the question is open at this time. I do not think it is a

matter of any consequence whether the demurrer is sustained or overruled. On the final hearing neither party will be prejudiced by this ruling.

7. Subdivision XIX.

I sustain the demurrer to this sub-division upon the ground that it is wholly immaterial. [441]

XXII.

Plea of Innocent Purchase
by
Bankers Trust Company and City Bank
Farmers Trust Company.

Of the three trust companies named defendants the Guaranty Company has disclaimed by proper answer any interest in the subject matter of the suit. Each of the others has filed a separate answer.

Defendant, Bankers Trust Company is trustee under a mortgage executed by the Northern Pacific Railway Company under date of November 10, 1896, known as "the prior lien mortgage", to secure a present outstanding principal amount of bonds in the sum of $107,330,600. These bonds are issued in both coupon and registered form, coupon bonds in denominations of $500 and $1000, and registered bonds in denominations of $100 and such multiples thereof as may be prescribed by the railway company. The greater portions of these bonds are in coupon form and pass by delivery. No record, therefore, exists by which the identity of the present holders may be accurately determined. Some knowledge, however, is gained from the ownership certi-

ficates which individual bond holders and certain others are required to file under Federal income tax regulations. Corporations are not required to file such certificates and there is, therefore, as to the greater part of the holdings of these coupon bonds no record. The evidence shows, however, the distribution of these bonds as of December 1, 1931, as follows:

I. Prior Lien Railway and Land Grant Gold 4% Bonds [442]

Outstanding as of December 1, 1931:		
Coupon		$ 77,807,000.00
Registered		29,523,600.00
Total		$107,330,600.00
Amount of Interest paid on said Prior Lien Bonds during 1931:		
To corporations (which, under present income tax regulations, are not required to file ownership certificates)		$ 2,525,924.57
To individuals and others who did file ownership certificates		1,730,132.43
Total		$ 4,256,057.00
The ownership certificates filed in connection with the payment of said $1,730,132.43 were as follows:		
Foreigners	$1,184	
Citizens and residents of the United States	2,468	
Fiduciary and Trustee accounts	2,015	
Partnerships	19	
Individuals classed as exempt	749	
Total number of ownership certificates	6,435	

City Bank Farmers Trust Company is trustee under the "General lien mortgage" dated November 10, 1896, executed by the Northern Pacific Railway Company to secure a bond issue in the principal amount of $190,000.000. Of this sum $130,000,000 principal amount was reserved to retire the prior lien bonds. The remaining $60,000,000 principal amount had been authenticated and delivered to the Trust Company, of which amount $54,451,500.00 principal sum is now outstanding in the hands of the public.

II. General Lien Railway and Land Grant Gold 3% Bonds

Outstanding as of December 1, 1931:

[443]

Coupon	$ 43,188,500.00
Registered	11,263,000.00
Total	$ 54,451,500.00

Amount of interest paid on said General Lien Bonds during 1931:

To corporations (which, under present income tax regulations, are not required to file ownership certificates)	$ 1,008,733.83
To individuals and others who did file ownership certificates	$ 630,247.17
Total	$ 1,638,981.00

The ownership certificates filed in connection with the payment of said $630,247.17:	
Foreigners	407
Citizens and residents of the United States	1,407
Fiduciary and Trustee accounts	1,347
Partnerships	20
Individuals classed as exempt	645
Total number of ownership certificates	3,826

As in the case of the prior lien mortgage no figures are available as to the number of corporate holders.

In the answer of each trustee company it is pleaded that by virtue of the mortgage to it the holders of the bonds outstanding under the mortgage are innocent holders and by separate answer that the trustee company itself is. As the legal questions raised under this answer are the same I will dispose of them together.

First: I hold that the trustee companies are not innocent purchasers.

Second: I hold that, as to all place lands patented or certified for patent prior to the date of the mortgages, the holders of the outstanding bonds are innocent purchasers. [444]

Third: So, likewise, are the bond holders innocent purchasers of all indemnity selections made and approved prior to the date of the mortgage, except such selections in lieu of place lands that did not, and as matter of law could not, pass under

the grant. The indemnity selections allowed for claimed losses within the place limits where the railroad parallels the line of the Portage, Winnebago & Lake Superior Railroad Company are within this exception.

Fourth: I think that the bond holders are likewise innocent purchasers of all place lands actually earned by the railroad company and which passed under the terms of the grant, even though not at the date of execution and sale actually patented or certified. Thus the lands classified under the Mineral Classification Act which were, in fact, not mineral in character, were at that date actually earned and had passed. If by fraud of the railway company the classification was, in whole or in part, wrong, the trust companies are not affected thereby except that the Government may have as against them, as well as against the railway company, a reclassification to determine what lands were, in fact, nonmineral and, therefore, did in fact pass under the grant.

The foregoing views will require that these pleas be sustained in part, and overruled in part. I shall not extend this report by a discussion of the reasons for my holdings on these pleas. If I am correct on the rulings made in respect of the rights of the railway company, of course, the pleas become immaterial except as applied to those lands falling within the rule I followed in discussing the questions in connection with the Portage, Winnebago & Lake Superior Grant. If, [445] on the other hand,

my views are unsound, then application of the doctrine of innocent purchaser, either as I have held or as the Court may find it should be held, can be taken up.

[Endorsed]: Filed May 31, 1933. [446]

[Title of District Court and Cause.]

EXCEPTIONS OF DEFENDANTS, NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION, AND NORTHWESTERN IMPROVEMENT COMPANY, A CORPORATION.

Now come the defendants Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation, and take the following exceptions to the report of the Special Master, Honorable Frank H. Graves, filed with the clerk of this Court on May 31, 1933:

I

The above named defendants except to the recommendation on page 36 of said report that these defendants' general motion to dismiss be denied. The Master's holding is based upon his conclusion that if the motion were sustained, there could be no accounting of the grant (Report pp. 35, 36) and on the further conclusion (Report pp. 34, 35) that the

Government may have the grant finally adjusted by this Court. The position of these defendants is that final adjustment of the grant is an administrative function and that the only questions with respect to adjustment of the grant that this Court may determine are those legal questions that are properly raised by the bill of complaint. Defendants' further position is however that the Court may and must do all the account- [447] ing of the grant that is necessary to determine how many acres and what acres have been expropriated by the Act of June 25, 1929, and the amount of compensation due defendants.

II

These defendants except to the Master's conclusion that the grant and contract made by the Act of July 2, 1864, were made by the Government in its sovereign capacity and that the Government in this suit is suing in its sovereign capacity to enforce sovereign rights, and that the plea of laches must therefore be overruled (Report pp. 36, 37).

III.

These defendants except to the conclusion of the Master that the pleas of res adjudicata made by these defendants should be overruled (Report, p. 38).

IV

These defendants except to the conclusion of the Master that defendants' demurrer to subdivision XXII of the bill of complaint should be overruled (Report, p. 95).

V

These defendants except to the failure of the Master to sustain defendants' plea of equitable estoppel to subdivision XXVIII of the bill of complaint (Report, p. 138).

GRAFTON MASON
D. R. FROST
D. F. LYONS
E. J. CANNON
Solicitors for Defendants,
Northern Pacific Railway Company,
a corporation,
Northern Pacific Railroad Company,
a corporation, and
Northwestern Improvement Company,
a corporation.

[Endorsed]: Filed June 20, 1933. [448]

[Title of District Court and Cause.]

EXCEPTIONS OF PLAINTIFF

Now comes the United States of America, the plaintiff in the above-entitled cause, and excepts to the report of Honorable Frank H. Graves, Special Master herein, filed in the office of the Clerk of this Court on the thirty-first day of May, 1933, in the following particulars, to-wit:

I.

The plaintiff excepts to the conclusion of the Master (page 31 of his report) that the clean-hands

doctrine does not apply to the defendants in this case.

II.

The plaintiff excepts to the conclusion of the Master (page 61 of his report) relative to Subdivisions VII and VIII [449] of the bill of complaint, wherein he states "that the respective demurrers to these subdivisions should be sustained."

III.

The plaintiff excepts to the conclusion of the Master (page 87 of his report) with reference to Subdivisions IX, X, XI and XII of the bill of complaint, wherein he states that "the demurrer should be sustained to each and every one of them" [and to the conclusion of the Master (page 211 of his report) with reference to Subdivision XI, where he states "I sustain the demurrer to this sub-division upon the ground that it is wholly immaterial."] Deleted—see stipulation filed 1/11/34.

IV.

The plaintiff excepts to the conclusion of the Master (page 87 of his report) relative to Subdivisions IX, X, XI and XII of the bill of complaint wherein he states that "the plea of acquiescence and waiver should be sustained."

V.

The plaintiff excepts to the conclusion of the Master (page 87 of his report) wherein he states that "the motion of the defendants railway company and

improvement Company to quash return of service on the railroad company as reorganized in 1875 should be sustained because I think there is no such concern in existence and never was and, hence, there was nobody who could be sued and of course nobody could be served."

VI.

The plaintiff excepts to the remark of the Master (page 87 of his report) with reference to the effect of the 1875 foreclosure proceedings upon the land grant under the terms of the Joint Resolution of May 31, 1870, wherein he states "I shall hold that the Government has no cause of complaint in that behalf." [450]

VII.

The plaintiff excepts to the conclusion of the Master (page 103 of his report) that defendants' plea of "estoppel by reason of the Yakima Indian transaction, and by reason of the years of recognition of the line by the Government," directed to Subdivision XXVI of the bill of complaint, should be sustained.

VIII.

The plaintiff excepts to the conclusion of the Master (page 111 of his report) that defendants' demurrer directed to Subdivision XXVI of the bill of complaint should be sustained.

IX.

The plaintiff excepts to the conclusion of the Master (page 122 of his report) that the demurrer

to Subdivision XXXV (inadvertently referred to by the Master as Subdivision XXV) of the bill of complaint should be sustained.

X.

The plaintiff excepts to the conclusion of the Master (page 146 of his report) with reference to Subdivision XXVIII of the bill of complaint, that defendants' demurrer to said Subdivision ought to be sustained.

XI.

The plaintiff excepts to the conclusion of the Master (page 161 of his report) relating to the subject-matter of Subdivision XXIX of the bill of complaint, to the effect that no reservation coming within Section 3 of the Act of July 2, 1864 was created by the Fort Laramie Treaty of September 17, 1851, and that the territories of the tribes referred to in said treaty remained Indian country within section 2 of the Act of July 2, 1864, whereas the Master should have concluded that the lands embraced [451] within said treaty were not "public lands" but were lands which the Indians were left free to occupy under treaty stipulations with the United States and were excepted from said Act of July 2, 1864 under the provisions of section 3 thereof.

XII.

The plaintiff excepts to the conclusion of the Master (page 164 of his report) relating to the subject-matter of Subdivision XXIX of the bill of

complaint, to the effect that no reservation for the Blackfoot tribes so as to bring their territory under section 3 of the Act of July 2, 1864 was created by the Blackfoot Treaty of October 17, 1855, and that the territory of said tribes continued to be Indian country until subsequently its status was altered, whereas the Master should have concluded that the lands embraced within said treaty (other than the common-hunting ground described therein) were not "public lands" but were lands which the Indians were left free to occupy under treaty stipulations with the United States, and were excepted from the said Act of July 2, 1864 under the provisions of section 3 thereof.

XIII.

The plaintiff excepts to the conclusion of the Master (page 171 of his report) that defendants' demurrer to Subdivision XXIX of the bill of complaint should be sustained.

XIV.

The plaintiff excepts to the conclusion of the Master (page 171 of his report) that defendants' plea of estoppel directed to Subdivision XXIX of the bill of complaint should be sustained.

XV.

The plaintiff excepts to the conclusion of the Master (page 180 of his report) that defendants' motion to dismiss Subdivision XXXII of the bill of complaint should be sustained. [452]

XVI.

The plaintiff excepts to the conclusion of the Master (page 194 of his report) relating to Subdivision XIII of the bill of complaint, wherein he states that "the demurrers to this subdivision must be sustained."

XVII.

The plaintiff excepts to the conclusion of the Master (page 194 of his report) as to the validity of mortgages executed following the 1875 foreclosure proceeding "that the United States has recognized them and acquiesced in and waived any possible want of power to their execution in the same manner and to the same extent as it has the foreclosure proceedings," whereas the Master should have concluded that the United States has not recognized said mortgages nor acquiesced in and waived want of power for their execution.

XVIII.

The plaintiff excepts to the conclusion of the Master (page 200 of his report) relating to Subdivision XVIII of the bill of complaint wherein he states that "the demurrer to this subdivision should be sustained."

XIX.

The plaintiff excepts to the conclusion of the Master (page 203 of his report) that defendants' plea of estoppel directed to Subdivision XVIII of the bill of complaint should be sustained.

XX.

The plaintiff excepts to the conclusion of the Master (page 207 of his report), relative to the subject-matter of Subdivision XXXVIII of the bill of complaint, "that the plea of waiver and acquiescence against forfeiture should be sustained." [453]

XXI.

The plaintiff excepts to the conclusion of the Master (page 209 of his report) relating to Subdivision XIV of the bill of complaint wherein he states "I must sustain the demurrer to this subdivision."

XXII.

The plaintiff excepts to the conclusion of the Master (page 211 of his report) that defendants' demurrer to Subdivision XXXIII of the bill of complaint should be sustained.

XXII-A.

See stipulation filed 1/11/34.

PLEA OF INNOCENT PURCHASER BY BANKERS TRUST COMPANY AND CITY BANK FARMERS TRUST COMPANY.

XXIII.

The plaintiff excepts to the conclusion of the Master (page 214 of his report) that as to all place lands patented or certified for patent prior to the date of the mortgages, the holders of outstanding bonds under said mortgages are innocent purchasers.

XXIV.

The plaintiff excepts to that portion of the Master's conclusion (set forth in the first paragraph on page 215 of his report) which reads as follows: "Third: So, likewise, are the bond holders innocent purchasers of all indemnity selections made and approved prior to the date of the mortgage, except such selections in lieu of place lands that did not, and as matter of law could not, pass under the grant," but plaintiff does not except to that portion of the Master's statement by which he impliedly concludes that the bondholders are not innocent purchasers of lands obtained as selections in lieu of place lands that did not, and as matter [454] of law could not, pass under the grant, nor does plaintiff except to the last sentence in the paragraph reading as follows: "The indemnity selections allowed for claimed losses within the place limits where the railroad parallels the line of the Portage, Winnebago & Lake Superior Railroad Company are within this exception." The Master should have concluded that the bondholders are not innocent purchasers of any indemnity lands or any claims for indemnity lands which have been or might be obtained under the Act of July 2, 1864 or the Resolution of May 31, 1870.

XXV.

The plaintiff excepts to the conclusion of the Master (page 215 of his report) that the bond-

holders are innocent purchasers of all place lands actually earned by the Railroad Company and which passed under the terms of the grant even though not at the date of the execution and sale actually patented or certified, and plaintiff further excepts to the conclusion of the Master wherein he states "If by fraud of the railway company the classification was, in whole or in part, wrong, the trust companies are not affected thereby." The Master should have concluded that the bondholders are not innocent purchasers of any place lands granted under the provisions of the Act of July 2, 1864, or the Resolution of May 31, 1870.

GEORGE C. SWEENEY
Assistant Attorney General
ROY C. FOX
United States Attorney for the Eastern District of Washington.
D. F. McGOWAN
Special Assistant to the Attorney General.
E. E. DANLY
Special Assistant to the Attorney General.

[Endorsed]: Filed July 8, 1933. [455]

[Title of District Court and Cause.]

ORDER

It Is Hereby Ordered that Frank H. Graves, Esquire, who was on the 25th day of February, 1932, appointed Special Master in this Court by order made and filed on said day, be allowed the sum of Twenty-five Thousand Dollars ($25,000.00) as compensation for his services to date, and that pursuant to the terms of said order of February 25, 1932, the amount of compensation herein fixed shall be borne equally and paid, one half each, by the plaintiff and the defendant, Northern Pacific Railway Company.

Done in open Court this 25th day of January, 1934.

J. STANLEY WEBSTER
District Judge.

[Endorsed]: Filed Jan. 25, 1934. [456]

[Title of District Court and Cause.]

Homer Cummings, Attorney General, Harry W. Blair, Assistant Attorney General, E. E. Danly, Special Assistant to the Attorney General, J. Crawford Biggs, Special Assistant to the Attorney General, J. M. Simpson, United States Attorney, Counsel for United States of America.

D. F. Lyons, D. R. Frost, Grafton Mason, F. J. McKevitt, Counsel for Northern Pacific Railway Company, Northern Pacific Railroad Com-

pany, and Northwestern Improvement Company.

Taylor, Blanc, Capron and Marsh, F. J. McKevitt, Mansfield Terry, Edward C. Watts, Jr., Henry R. Labouisse, Counsel for City Bank Farmers Trust Company.

White and Case, F. J. McKevitt, J. Du Pratt White, G. L. Vaught, Jr., Alfred N. Hueston, Counsel for Bankers Trust Company.

MEMORANDUM

Plaintiff's bill in equity in this case was filed pursuant to the provisions of the Act of June 25, 1929 (46 Stat. 41). Upon the filing of the defendants' answers the defendants moved that there be taken up in advance of trial under Equity Rule XXIX certain defenses pleaded in the answers. This rule provides that "Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the Court". The motion was granted and on February 25, 1932, Frank H. Graves, Esquire, was appointed special master in chancery and these [457] defenses were referred to him for consideration and report. After taking testimony pertinent to the defenses referred to him the special master fixed May 10, 1932, as the time for oral argument. Counsel for both sides of the

controversy appeared at the time appointed and the arguments covered the period from May 10, 1932, to May 25, 1932. The report of the special master was filed on May 31, 1933. Thereafter exceptions to the report were duly filed by the parties respectively, the plaintiff filing twenty-five exceptions and the defendants filing fourteen. These exceptions challenge practically all of the conclusions and recommendations of the special master. Thereafter the Court fixed January 9, 1934, as the time for hearing argument on the exceptions and these arguments covered, without interruption, the period from January 9, 1934, to and including January 24, 1934. At the conclusion of the oral arguments time was allowed for the filing of briefs and in due course voluminous, exhaustive and extraordinarily able briefs were filed. The case is now under submission on the exceptions to the report of the special master.

Equity Rule 61½, promulgated May 31, 1932, provides in part that "the report of the master shall be treated as presumptively correct, but shall be subject to review by the Court, and the Court may adopt the same, or may modify or reject the same in whole or in part when the Court in the exercise of its judgment is fully satisfied that error has been committed".

After careful and painstaking consideration and study of the oral arguments and elaborate briefs and an examination of the controlling authorities, and after repeated and critical perusals of the special master's report, I am not only not "fully

satisfied" that error has been committed by the special master but on the contrary I am "fully satisfied" that his conclusions are sound and correct. His report is painstaking, exhaustive and masterful, and the more I have examined and analyzed it in the light of the vigorous criticisms of it, made in oral arguments and written brief, the more I am convinced that his views and conclusions are sound and are amply sustained in reason, principle and authority.

Whilst in some instances additional reasons might be advanced in support of the conclusions reached, and in others different reasons may suggest themselves, [458] in every instance I find myself in complete accord with the result arrived at. If the learned special master and I were sharing a joint and equal responsibility as members of a court in deciding the questions involved, and he had submitted his report in the form of a proposed opinion, I should not hesitate fully to concur in it. In such circumstances it would serve no useful purpose but would be a labor of supererogation on my part to undertake any extensive elaboration of the master's report.

On the important question of the proper application of the equitable maxim or doctrine of "He who comes into equity must come with clean hands" I wish to call attention to the case of Manufacturers Finance Company vs. McKey, Trustee in Bankruptcy, 294 U. S. 442, decided by the Supreme Court on March 4, 1935, and long after the special master

had filed his report. It seems to me that this case lends strong support to the views of the special master as to the application of the "clean hands" doctrine to the facts of the case in hand.

With respect to Subdivision XXXVIII of the bill, alleging the fraudulent classification of lands under the Mineral Classification Act of February 26, 1895 (28 Stat. 683), I feel a word should be added. In view of the tentative and qualified conclusions of the special master on this aspect of the case (see special master's report, page 146) I attempted during the course of the oral arguments before the Court to have counsel for the government define a trifle more specifically the purpose of these allegations and just what place they were intended to occupy or what office they were intended to perform in the theory of the government's case. The result was that counsel for the government (Mr. McGowan) by repeated and definite oral statements asserted that no money judgment was sought by the government in the way of damages for the alleged fraudulent classification, nor did the government ask any reclassification of the lands; that the sole purpose of the allegations in this regard was to give rise to the application of the "clean hands" doctrine. No motion for leave to amend the bill in accordance with the special master's suggestion has been made. The sole point, therefore, in this aspect of the case is whether these allegations are sufficient to call for the application of the [459] "clean hands" maxim. Since I fully concur in the special

master's opinion that the allegations do not give rise to the "clean hands" doctrine the demurrer or motion directed to the portion of the bill now under consideration should be sustained and this matter should be stricken from the bill.

I feel that a few brief observations are in order concerning Subdivision XXIX of the bill relating to the Fort Laramie Treaty of September 17, 1851, and the Blackfoot Treaty of October 17, 1855—this because of the recent decisions of the Court of Claims in the Fort Berthold case, decided December 1, 1930, and the Blackfoot case decided April 10, 1933, and the kindred cases decided by that court dealing with the same or similar questions. None of these cases either held or intimated that the lands covered by the treaties in question were reserved lands within the meaning of Section 3 of the Act of July 2, 1864. Under the broad jurisdictional acts, pursuant to which these cases were instituted, it was not necessary to recovery by the Indians that the land be held to constitute a technical reservation under the treaties and we must not be misled by the broad language employed in the opinions of the Court. These treaties may well give rise to substantial recovery by the Indians without at all implying that the lands assigned to the various tribes under the provisions of the treaties were removed from the operation of the original land grant to the railway company.

To illustrate how ridiculous it would be to hold that these treaties exempted the lands covered by them from the grant to the railway company let us

note briefly the situation as to the Crow Territory alone. Under the Fort Laramie Treaty the acreage in the Crow Territory was 37,500,000 acres and there were approximately 3000 Crow Indians in 1851. This means that 12,500 acres or more than eighteen square miles, were "reserved" for each man, woman and child in the Crow tribe. If there had been a reservation of these lands so that they did not pass under the grant of 1864, the railway company would have been compelled to build more than 700 miles of railroad without the aid of the grant except to the limited and comparatively inconsequential extent that it might be able to secure indemnity. Since the purpose of the Act of 1864 was to aid and encourage the construction of a transcontinental railroad from Lake Superior to Puget Sound it would hardly do to hold that [460] Congress in that very act so contrived as to make the construction of such a railroad impossible. It requires no argument to demonstrate that if these lands had been reserved the road could not have been constructed. I am convinced that it was never the thought or purpose of the Congress that the lands involved in these treaties were to be excepted from the grant to the railway company, no matter what effect that may have had in conferring some rights upon the tribes involved.

My conclusion is that all exceptions filed, both by plaintiff and defendants, be overruled and that the report of the special master in its entirety be adopted. Order accordingly will be entered in due course.

[Endorsed]: Filed Sept. 9, 1935. [461]

[Title of District Court and Cause.]

ORDER

This cause came on to be heard upon the report of the Special Master, filed herein on the 31st day of May, 1933, and the exceptions of the various parties thereto; and the Court having heard argument and being fully advised in the premises, it is now ordered, adjudged and decreed as follows, viz:

1. All the exceptions of plaintiff and of defendants be and they hereby are overruled.

2. The report of said Special Master be and hereby is adopted in its entirety.

3. The replies of plaintiff to the answers and amended answers of defendants, Northern Pacific Railway Company and Northwestern Improvement Company, and the reply to the answer of the Northern Pacific Railroad Company, be and they hereby are stricken from the files of the Court.

4. The return of service of summons upon Edward A. Gay, as an officer of Northern Pacific Railroad Company as reorganized in 1875, be and the same hereby is quashed. [462]

5. The following subdivisions and portions of subdivisions of the complaint be and they hereby are dismissed from said complaint: Subdivisions VI, VII, VIII, all of IX except the first two paragraphs thereof, all of X except the third paragraph thereof, XI, XII, XIII, XIV, XV, XVIII, XIX, XXVI, XXVII (granted on application of plaintiff), XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXV, XXXVI, and XXXVIII.

It is further ordered and decreed that the Special Master proceed with the final hearing as provided in the order of appointment entered herein February 25, 1932.

Dated 3rd Oct. 1935.

J. STANLEY WEBSTER
District Judge.

O. K. as to form.
J. M. SIMPSON
U. S. Atty.
D. F. LYONS
Sol. for Defendants
Nor. Pac. Ry. Co. Nor. Pac. Rd. Co. and Northwestern Improvement Company.

[Endorsed]: Filed Oct. 3, 1935. [463]

[Title of District Court and Cause.]

ORDER

On motion of the defendants, Bankers Trust Company, a corporation, and City Bank Farmers Trust Company, a corporation, heretofore filed in this Court and heard before me the 13th day of January, 1936; plaintiff appearing by one of its solicitors, J. M. Simpson, United States District Attorney for the Eastern District of Washington; the defendants, Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, Northwestern Improvement Company, a corporation, Bankers Trust Com-

pany, a corporation, and City Bank Farmers Trust Company, a corporation, appearing by one of their solicitors, F. J. McKevitt; the Court having heard the argument and being fully advised in the premises, it is now

Ordered, Adjudged and Decreed that that certain order heretofore entered in the above entitled Court on the 3rd day of October, 1935, be and the same is hereby amended to read as follows:

"This cause came on to be heard upon the report of the Special Master, filed herein on the 31st day of May, 1933, and the [464] exceptions of the various parties thereto; and the Court having heard argument and being fully advised in the premises, it is now ordered, adjudged and decreed as follows, viz:

"1. All the exceptions of plaintiff and of defendants be and they hereby are overruled, except that there are reserved until the final hearing all questions with respect to the defenses of innocent purchasers for value interposed by the defendants Bankers Trust Company, as Trustee, and City Bank Farmers Trust Company, as Trustee.

"2. The report of said Special Master be and hereby is adopted in its entirety, except for the matters reserved as just provided.

"3. The replies of plaintiff to the answers and amended answers of defendants, Northern Pacific Railway Company and Northwestern Improvement Company, and the reply to the answer of the Northern Pacific Railroad Company, be and they hereby are stricken from the files of the Court.

"4. The return of service of summons upon Edward A. Gay, as an officer of Northern Pacific Railroad Company as reorganized in 1875, be and the same hereby is quashed.

"5. The following subdivisions and portions of subdivisions of the complaint be and they hereby are dismissed from said complaint: Subdivisions VI, VII, VIII, all of IX except the first two paragraphs thereof, all of X except the third paragraph thereof, XI, XII, XIII, XIV, XV, XVIII, XIX, XXVI, XXVII (granted on application of plaintiff), XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXV, XXXVI, and XXXVIII. [465]

"It is further ordered and decreed that the Special Master proceed with the final hearing as provided in the order of appointment entered herein February 25, 1932."

Done in open Court this 29th day of January, 1936.

J. STANLEY WEBSTER
District Judge.

O. K. as to Form:
J. M. SIMPSON
United States Attorney.
F. J. McKEVITTE
Solicitor for Northern Pacific Railway Co., Northern Pacific Railroad Co., Northwestern Improvement Co., Bankers Trust Co. and City Bank Farmers Trust Co.

[Endorsed]: Filed Jan. 29, 1936. [466]

[Title of District Court and Cause.]

ORDER

On motion of the plaintiff filed in this Court, plaintiff appearing by two of its solicitors, J. M. Simpson, United States District Attorney for the Eastern District of Washington, and E. E. Danly; the defendants, Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation, appearing by one of their solicitors, D. R. Frost; Bankers Trust Company, a corporation, and City Bank Farmers Trust Company, a corporation, appearing by one of their Solicitors, F. J. McKevitt; the Court having heard argument on the motion on this 21st day of April, 1936 by consent of all parties, and no objection being made by any of the parties to the granting of the motion and the Court being fully advised in the premises, it is now

Ordered, Adjudged and Decreed that that certain order of reference heretofore entered in the above entitled cause on February 25, 1932, ratified by the order of this Court entered on October 3, 1935 (as amended by an order entered on January 29, 1936) be and the same is hereby amended as follows:

[467]

That the Special Master proceed with the hearing of said cause and take evidence relative to all matters therein not covered by the Special Master's Report filed herein May 31, 1933, except evidence relative to the values of lands in controversy and the

amount of compensation due plaintiff or any of the defendants, hear argument of counsel thereon, and report to this Court his findings of fact and conclusions of law and the evidence taken, together with recommendations for an order or decree thereon, said findings and conclusions to be subject to review by this Court.

After the findings and conclusions and recommendations have been reported to this Court and any exceptions thereto have been heard and determined and an order or decree thereon has been entered, in event no appeal from any order or decree in this cause shall be taken within 60 days thereafter, said Special Master shall proceed with the final hearing of said cause and make full and complete findings of fact and conclusions of law and report the same to this Court together with the evidence taken, said findings and conclusions to be subject to review by this Court.

Done in open court this 21st day of April, 1936.

J. STANLEY WEBSTER
United States District Judge

Form approved:
D. R. FROST
F. J. McKEVITT
E. E. DANLY

[Endorsed]: Filed Apr. 21, 1936. [468]

[Title of District Court and Cause.]

To the Clerk of the Above Entitled Court:

You will please enter my appearance as Solicitor for Northern Pacific Railway Company, Northwestern Improvement Company, and Northern Pacific Railroad Company, defendants in the above entitled cause, and service of all subsequent papers, except writs and process, may be made upon said Northern Pacific Railway Company, Northwestern Improvement Company, and Northern Pacific Railroad Company, defendants, by leaving the same with

L. B. daPONTE

Office Address
Northern Pacific Building,
St. Paul, Minnesota.

[Endorsed]: Filed July 22, 1937. [469]

[Title of District Court and Cause.]

REPORT ON ADJUSTMENT

Sir:

I have the honor to transmit herewith my report on the adjustment of the Northern Pacific Railroad grants under the amended Order of reference of April 21, 1936, together with the testimony and exhibits.

I hope that Your Honor and counsel will find the

several subjects adequately treated in what I have written.

Respectfully submitted,
F. H. GRAVES,
Special Master.

July 23, 1937.

THE HONORABLE J. STANLEY WEBSTER,
Judge of the District Court of the United States for the Eastern District of Washington.

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Preliminary Matters.

The Two Grants.

The grant of land under the Act of July 2, 1864, 13 Stat. 365, Sec. 3, in aid of the road from Lake Superior to Puget Sound, is in these words:

> "Sec. 3. And be it further enacted, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold,

reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: . . . Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, and within fifty miles thereof, may be selected as above provided: And provided, further, That the word 'mineral', when it occurs in this act, shall not be held to include iron or coal. . . ."

The Joint Resolution of May 31, 1870, 16 Stat. 378, adopts the grant of 1864, and applies it to the line from Tacoma to Portland. It provides further as follows: [472]

"and in the event of there not being in any State or Territory in which said main line or

branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four."

The two enactments will be referred to frequently as the "Act" and the "resolution", respectively.

Terminology.

In the administration of railroad grants a certain terminology has grown up in the Land Office. That terminology may as well be stated and examined here as elsewhere, because it is used in the testimony and exhibits in the case, and in the argument of counsel before me, and will be employed in this report. The irregular quadrilateral formed by the terminal limits at Ashland and Pasco under the

grant of 1864 for the main line and at Pasco and Tacoma for the branch line over the Cascades; and by the lateral limits of 40 miles on either side of the road through Territories and 20 through States; and the like quadrilateral formed by the grant contained in the resolution of 1870, between Portland and Tacoma, are termed the place limits, sometimes the primary limits, and the lands comprehended within these limits are termed the place lands, sometimes the primary lands.

Lands lying within the place or primary limits, but "granted, sold, reserved, occupied by homestead settlers, or preempted or otherwise disposed of" prior to the time the line of the [473] road opposite to which such lands lay was definitely fixed, are said to have been "lost" to the grant. In lieu of the lands so lost, the company was entitled to select other lands in odd-numbered sections within the distances specified by the act and resolution, known as the indemnity limits or indemnity belts.

The 10-mile strip provided by the act, in which selection for losses might be made, is termed the first indemnity belt. The 10-mile additional strips authorized to be laid down under certain restrictions where necessary by the resolution, and which were laid down in the states and in certain territories, are called the second indemnity belt. By the act the company might indemnify itself for mineral losses out of any odd-numbered sections lying within 50 miles of the road on either side. This is called the mineral indemnity belt. Certain peculiarities of this

belt should be noted. Because of the restriction to 50 miles, the exterior limit of this belt through territories is co-terminous with the exterior lines of the first indemnity belt, and it follows, hence, that no mineral selections could be made in the second indemnity belt in those portions of the line. In the states, however, the exterior line of the mineral belt fell 10 miles beyond the limit of the second indemnity. On its face, it covered the place as well as the first indemnity in the territories and the extended limits in the states, with the result that selections for mineral losses might be made in the place limits. The Land Department has permitted such selections in certain cases under an opinion of Attorney-General Wickersham, of date July 24, 1912, reported in 41 L. D. 571. Whether this ruling of the Attorney-General and the consequent practice of the Land Office was correct is one of the questions in this case. It, of course, can have applica- [474] tion only to cases where lands in the place limits had been reserved by the government for some purpose, or occupied by settlers under the land laws of the United States, at the date of definite location, with the consequence that such lands did not pass under the grant, and thereafter were restored to the public domain for whatever reason. In many instances the company has claimed, and has been allowed, the right to make selections for mineral losses from such restored lands.

Prior losses mean losses which occurred in the place limits prior to the date of the act. Subsequent

losses mean those occurring between the date of the act and the date of definite location of a given section of the road. Both prior and subsequent losses might be satisfied in the first indemnity belt anywhere along the line without reference to the state or territory in which they had occurred.

N. P. exhibit 131, a map of the route of the road from Ashland on Lake Superior to Tacoma, and from Tacoma to Portland, and of the land grant limits pertaining thereto, illustrates the grants conferred by the act and the resolution. The yellow strip represents the belt 40 miles in width on each side of the road through the territories and 20 miles on each side through the states, constituting the primary or place limits. The pink strip on each side represents the first indemnity belt created by the act. The green strips represent the second indemnity belt created by the resolution. The brown strips in the states represent the additional limits not more than fifty miles from the road within which selections might be made in lieu of mineral losses. The red areas within the place limits represent tracts originally lost to the grant, and afterward restored to the public domain. No [475] second indemnity limits exist in North Dakota because at the date of final location in that territory there was no deficiency, that is, the lands available in the first indemnity limits exceeded the losses in the place limits. The same condition existed in Washington as to the grant by the act of 1864, that is, the grant in aid of the construction from the east to

Pasco and thence to Tacoma. Whether second indemnity limits, though shown on the exhibit for the grant in Washington by the resolution, that is, the grant in aid of the construction from Kalama, north of Portland, to Tacoma, were authorized, is a point in issue hereafter to be discussed. Place limits and first indemnity limits appurtenant to construction in Washington under the act extend into Oregon, for those limits depend upon the location of the route of the road and extend for the prescribed distance laterally regardless of an intervening state or territorial boundary. The same condition as to first indemnity limits prevails in Wyoming with respect to construction in Montana, but the second indemnity limits resulting from the Montana deficiency do not extend into Wyoming because the resolution confines additional indemnity for any state or territory in which the grant is deficient to "such State or Territory". The second indemnity limits in Idaho to the north do not extend for the full 10 miles because intercepted by the international boundary.

The lateral lines of the several limits are shown in continuous straight or curved lines. In fact, as other exhibits disclose, the lateral lines are jagged, following sectional and subdivisional boundaries pursuant to a necessarily arbitrary rule of the General Land Office, about which there is no controversy. Arcs were described at specified intervals 20, 40, 50 or 60 miles from the line of road, as the case might be, tangents to such arcs [476] were

drawn, and the lateral lines were drawn through the tangents on sectional and sub-divisional lines in such a way as to balance the gains and losses. The terminal limits also were established by arbitrary rule. A line was drawn from some selected point on the road to the terminus and a perpendicular to that line, erected at the terminus, became the terminal limit. Such terminal limits may be seen at Ashland, Wisconsin, and at Pasco, Washington, for the grant by the act for the main line, at Pasco and Tacoma for the branch line, and at Portland and Tacoma for the grant by the resolution. The exhibit also indicates the dates of definite location of the several sections of the road under both grants, and the dates at which the several indemnity limits in each of the states and territories were laid down.

Prior to 1879 all railroads having land grants with indemnity rights were allowed to make indemnity selections in bulk, that is, without assigning a specific loss for each tract selected as indemnity. Thereafter, subject to exceptions, they were required to specify their losses and selections tract for tract. The history of Land Office practice in this respect is recounted in La Bar v. Northern Pacific, 17 L. D. 406. In the process of selecting indemnity the losses are sometimes called base, and the process itself is called assignment of losses or assignment of base. The lists of the losses are sometimes called base, and the process itself is called assignment of losses or assignment of base. The lists of the losses and of the indemnity lands selected are called selection lists, several of which are in evidence.

In this report all losses other than mineral will at times be referred to as general losses. A distinction is to be observed with respect to the character of lands which might be selected as indemnity for the two classes of losses. While mineral lands were excluded from the operations of the act, it was [477] provided that the word "mineral" should not be held to include iron or coal, and hence such lands could be selected in lieu of general losses. As, however, by the third proviso, selections for mineral losses were limited to agricultural lands, iron and coal could not be taken for mineral losses. This is obviously correct irrespective of the definition which shall ultimately be given to the phrase "agricultural lands" as used in that proviso.

Occasionally lands not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, have been referred to as "free" lands, and I shall in this report at times employ that term to save repetition and circumlocution. Of course, this term does not have any reference to mineral lands or mineral losses. These are in a class by themselves.

All free lands within the place limits and all lieu lands properly selected by the company within indemnity limits, are, in the process of adjustment, said to be charged to the grant.

Established Principles.

Under these grants certain principles are firmly established and are not in dispute. The grants of

land in place limits are in praesenti. I quote here for precision Mr. Justice Field's definition of what is meant by that phrase in St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company, 139 U. S. 1, 5:

> "As seen by the terms of the third section of the act, the grant is one in praesenti; that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, preemption, or other disposition previous to the time the definite route of the road is fixed. The language of the statute is 'that there be, and hereby is, granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer [478] of a present title, not a promise to transfer one in the future.
>
> The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one in praesenti; that is to say, it is of that character as to all lands within the terms of the grant, and not reserved

from it at the time of the definite location of the route.

This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion."

In that sense the lands in indemnity limits were not "granted". The grant was rather of a right or power. That right or power is protected, however, under the due process clause of the Constitution, as much as in the grant of the lands in place. No right to any specific tract of land vested in the railroad until it had been selected, and thereupon, when properly selected and allowed, the company became entitled to the selected lands by the same right and with the same vigor as it held the lands in place. Again for precision I quote the language of Mr. Justice Van Devanter in Payne v. Central Pacific Railway Company, 255 U. S. 228, 236:

> "The ultimate obligation of the Government in respect of the indemnity lands is on the same plane as that respecting the lands in place. The only difference is in the mode of identification. Those in place are identified by filing the map of definite location, and the indemnity lands by selections made in lieu of losses in the place limits."

It may be added here, too, that until the time of such selection, all lands in indemnity belts were open to settlement under the land laws of the

United States, and thus might be lost to the right of selection by the railroad company. Hewitt v. Schultz, 180 U. S. 139. [479]

The duties of the Secretary of the Interior with respect to the provision of the act authorizing the company to select indemnity under his "direction" are comprehensively stated by Mr. Justice Van Devanter in Payne v. Central Pacific Railway Company following the quotation just given above:

> "The selections are to be made by the grantee, not by the Secretary of the Interior. True, the act provides that they shall be made under the Secretary's direction, but this merely applies to them the general rule, announced in Rev. Stats., 441, 453, 2478, that the administrative execution of all public land laws is to be under his 'supervision' and 'direction.'" Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155, 166. Its purpose is to make sure that, in accord with that power of supervision and direction, he is to see to it that the right of selection is not abused, that claims arising out of prior settlement and the like are not disturbed, that no indemnity is given except for actual losses of the class intended, and that the lands selected are such as are subject to selection. But of course it does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act."

Obviously the Secretary's duty may be, and ordinarily must be, exercised by general regulations, but it should be borne in mind that these regulations cannot have the effect of curtailing or enlarging the rights of the company as granted by the act and resolution. I make this observation because in the testimony and in some of the Land Office decisions there is a tendency to exalt the regulations and to assign reasons of convenience for their application wholly beyond the purpose for which they are made.

Some Preliminary Rulings.

Certain questions in connection with the indemnity belts that will arise at various places in this report have not been settled, and I think it will be more convenient to state and determine them here than elsewhere. The United States says, and [480] the Land Department has held, that only subsequent losses can be indemnified in second indemnity limits. I do not think this is sound. The language of the resolution authorizing second indemnity limits uses the term "subsequent to the passage of the act" only as a measure of the quantity of losses that may be satisfied in second indemnity, not as a definition of the character of those losses. So long as the selections made in second indemnity do not exceed the subsequent losses, both prior and subsequent losses may be satisfied in second indemnity. This seems to me plain.

On the other hand, the company insists, or, perhaps it were better to say, suggests, that no warrant is to be found in the terms of the resolution, limiting the selection in second indemnity to losses arising in the state or territory to which the limits appertain. I hold that the phraseology employed, and the spirit of the provisions of the resolution authorizing a second indemnity belt, have the effect of restricting the losses to be there satisfied to those originating in the same state or territory. I do not think that I am called upon to enlarge upon this ruling or to further explain my meaning, because the company makes no argument upon the point, but only a suggestion as indicated above. Probably it makes no difference in the result.

While title to the lands in the place limits vested immediately upon filing of the map of definite location whether the lands had been surveyed or not, title to land in the indemnity limits did not attach until the lands had actually been selected, and under the rulings of the Land Office such selections could not be made prior to survey. Several successive statutes provided for the survey of public lands in the states and territories through which the road ran, but the progress of the surveys did [481] not by any means keep up with the construction of the road, nor proceed fast enough to enable the company to make rapid selections. The government has suggested at various places in its testimony that these delays were, in part at least, due to the fault of the company in failing to make deposits or pay-

ments as required by the various statutes. In argument before me, however this point is not urged, and I do not know whether it is intended to be waived. In any event, I am convinced by the testimony that the company acted in respect of these surveys with reasonable diligence. It is probable that in some cases it might have proceeded a little more promptly, but the successive statutes were more or less difficult of application, and I think, all things considered, that the company did the best it could under the conditions. Mr. Frost, in argument to me, said that, notwithstanding certain allegations in its pleadings, and certain suggestions made in the taking of testimony, it did not criticize the government in respect of these surveys, and that he presumed it proceeded as fast as could reasonably be expected under the circumstances. I think the evidence fully justifies that concession. I should so hold even if it were not conceded.

"The Forest Reserve Case".

By the Act of March 3, 1891, 26 Stat. 1103, the United States initiated the policy of setting apart public lands in national forests. From that act is derived the first paragraph of U. S. C. A., Title 16, Sec. 471, relating to the establishment and administration of national forests, as follows:

> "The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, (in) any part of the public lands wholly

> or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof." [482]

In 1892 5,120 acres of odd-numbered sections with the second indemnity limits of the Northern Pacific grant in Montana were withdrawn pursuant to that statute. More extensive withdrawals were made in 1898. Withdrawals for national forests and other purposes continued to be made, so that up to the present time 3,369,627.95 acres of odd-numbered sections within the indemnity limits of the grant of 1864, and 368,729.50 acres of odd-numbered sections within the indemnity limits of the grant of 1870 have been included in the withdrawals for forest reserves and other governmental purposes. The validity of such withdrawals of indemnity lands pervades the entire case, for of the specific lands that are possibly available to meet the deficiencies in the grants, and for which in this proceeding the company seeks compensation, only about 700 acres within the grant of 1864, and about 2,000 acres, as computed by the company, or 7,000 acres, as computed by the government, within the grant of 1870, lie outside the lands so withdrawn. Govt. exhibit 88 is a map showing the lands withdrawn for national forests and for the Tongue River-Northern Cheyenne Indian Reservation.

On several occasions subsequent to 1898 the company had filed selection lists for the purpose of ob-

taining indemnity lands within the withdrawn areas in lieu of place losses, but the Land Office had rejected or withheld such selections because of the withdrawals. In 1905 such a list of mineral losses, aggregating 5,681.76 acres, was filed for the selection of lands in the first indemnity limits in Montana within an area temporarily withdrawn under executive order, and afterward included in the Gallatin National Forest. Through inadvertence the local land office approved the list, and the lands were patented to the com- [483] pany. Later, on discovery of the fact, the United States instituted a suit for the cancellation of the patent. The case reached the Supreme Court of the United States, and is the often-referred-to Forest Reserve case, United States v. Northern Pacific Railway Company, 256 U. S. 51.

By the act of March 3, 1887, Congress had directed the Secretary of the Interior to immediately adjust all railroad land grants in accordance with the decisions of the Supreme Court. On March 26, 1906, the Commissioner of the General Land Office addressed a letter to the Secretary of the Interior transmitting a statement of the Northern Pacific grants, known as the Jones adjustment. That report showed a deficiency in the 1864 grant of 3,666,451.74 acres, and in the 1870 grant of 532,029.73 acres. Without undertaking here to finally interpret the Forest Reserve case, the Supreme Court there said that whether the withdrawal of the lands then in controversy was valid, depended upon whether the grant of 1864 was deficient at the time of the tempo-

rary withdrawal, that is, whether, aside from the withdrawn lands, sufficient lands remained, or remained and were available, to satisfy the remaining losses. Counsel in that case had stipulated that the deficiency shown by the Jones adjustment existed, but since it did not appear that that report or adjustment had been called to the attention of the Secretary of the Interior, who alone by the Act of 1887 was authorized to adjust the grant, it was not accepted by the Court as authoritative, and the case was remanded in order to permit the parties to supplement the record by a proper showing as to whether sufficient lands remained outside the withdrawn lands to satisfy the determined deficiency. [484]

In my former report, pp. 13-14, I related briefly the proceedings following the Forest Reserve case and leading up to the passage of the act of June 25, 1929, under which this suit was brought. At pp. 20-23 I stated the substance of the several provisions of that act. I think it will not be necessary to restate any of those things here.

The Pleadings.

At pp. 23-25 of my former report I undertook, in general terms, to define the pleadings and to classify the several paragraphs of the bill. That was done, however, with reference to the matters covered by that report, and I think it may be well to make a brief statement of the pleadings so far as concerns the matters here to be considered. Certain of the allegations of the bill, such as those pertaining to

failure to subscribe for the requisite amount of stock, the reorganization of 1875, the reorganization of 1896, the circuitous route through Washington, the claim of forfeiture for failure to comply with the condition subsequent requiring the company to construct the road on time, and perhaps some others of the same sort, have all been disposed of. Most of those related to such fundamental defects as were supposed to defeat the grant in whole or in part, and so were properly and necessarily pleaded.

Certain other allegations related to the admeasurement of the grants such, for instance, as the conflict with the Portage, Winnebago, and Superior Railroad, the lateral errors in Montana and Idaho, and the terminal errors at Ainsworth and Portland. All these latter allegations and others of the same nature, I assumed in that report, were necessary to be pleaded as going to the adjustment of the grant. No suggestion was made by counsel [485] in argument before me, nor do I think before Your Honor, upon this point, and it was not material whether they were necessarily pleaded, nor what was a proper pleading. I took the allegations in the bill and answer as they were on that subject, and I believe that Your Honor so accepted the pleadings, neither counsel contending anything about it.

Now, however, we are confronted with a situation requiring a determination of what pleadings are necessary for the purpose of the adjustment, which is the matter now under consideration. Again, in

the recent argument before me, no suggestion was made by counsel on either side, upon the subject, and no authorities were cited. Nevertheless, it must be determined preliminarily because many of the important questions presented upon the adjustment are not mentioned in the pleadings in any way; for instance, on the part of the United States, the question whether, under the resolution, lateral limits on the Tacoma-Portland line were authorized, and the question of what is "agricultural land" within the meaning of that term as used in the provision for indemnity for mineral losses; and, on the part of the company, the request for reassignment of base. The subject of the Tacoma Overlap is likewise not pleaded.

I am now convinced that no pleading upon the subject of the adjustment is necessary, nor, I think, is proper, except an allegation that the grants are unadjusted and that the act under which the suit is brought requires this court to adjust them; and I think that in that adjustment, quoting from page 22 of my former report, "every question from the organization of the company to the date of the Act that had been, or that now might be, raised, should be presented to the Court and finally determined." [486]

By such a pleading the whole subject of adjustment, as distinguished from such fundamental questions as were supposed to defeat the grants, would have been brought into the case. Whatever else adjustment may mean, an adjustment as re-

quired by the act of June 25, 1929, means that every question affecting the administration of the grants from the beginning of that administration to the date of the act should be brought under review, and should be determined by the court, even though in so doing it might become necessary to modify, overrule or disapprove the doctrines, practice, and orders, made from time to time by the General Land Office in the administration of the grants.

The title of the Act of June 25, 1929, speaks of an "adjustment". It is as follows:

> "An Act To alter and amend an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern route,' approved July 2, 1864, and to alter and amend a joint resolution entitled 'Joint resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes,' approved May 31, 1870; to declare forfeited to the United States certain claimed rights asserted by the Northern Pacific Railroad Company, or the Northern Pacific Railway Company; to direct the institution and prosecution of proceedings looking to the adjustment of the grant, and for other purposes."

In the fifth section the Attorney-General was authorized and directed to institute and prosecute such suit or suits as might, in his judgment, be required

to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of the company, and to have all controversies and disputes mentioned in the act respecting the operation and effect of the grants judicially determined and a full "accounting" had. In the prayer of the bill in this case the phrase [487] "an adjustment and accounting" is employed. I take it that all of these terms mean practically the same thing. I do not mean that this adjustment is an accounting, as that term is generally used. I mean only to say that in my view the proceedings in the adjustment of these grants are analogous to an accounting, and that the same principles of pleading are to be applied as are applied in accounting cases in equity, and to certain other classes of equitable suits discussed in the cases hereafter cited.

A bill for an accounting pleads the occasion and necessity for the accounting, but does not set forth the items of the account. This I think is fundamental. In 1 C. J. S. 669, under the head of equitable accounting, it is said:

> "Facts showing the right to an accounting must be specifically alleged if known to plaintiff, but the items of account need not be alleged, . . ."

An exception exists in the case of a suit against one for whom plaintiff is acting in a fiduciary capacity, where plaintiff should present his account with his bill.

In Calbeck v. Herrington (Ga. 1930) 152 S. E. 53, 56, it is said:

> "In an equitable proceeding to obtain an accounting, the plaintiff is not obliged to set out an itemized statement showing the amounts claimed, or to aver how much is due by the defendant upon an accounting; but all the petitioner in such a proceeding has to aver are facts sufficient to indicate that something will be found to be due to plaintiff by defendant."

The procedure indeed is implied in Equity Rule 63, requiring parties accounting before a master to bring in their respective accounts in the form of debtor and creditor. The parties here by their exhibits have, substantially, done this.

Therefore I shall proceed in making this adjustment upon the proof as submitted, upon the principles of the law of the grant, [488] and upon the doctrines of equity, in determining the final result. I should add that while the United States objected to the offer of evidence by the defendant touching the reassignment of base, and the Railway Company objected to the Government's evidence of error in the survey of the Montana place limits, for the reason in each case, that the matter was not pleaded, yet in argument and in the briefs filed before me neither makes any insistence upon the point.

Upon the question of the necessity of pleading specific items, my greatest concern arose with respect to the Government's objection to the defendant's evidence in support of its request for reassign-

ment of base. Doubt is removed, however, by reference to the principle which is evidently well settled, and which appears to me to be sound and satisfactory, that a party who demands an accounting submits himself to the result, and that no cross bill is necessary.

A general statement of the rule is found in 1 Am. Jur. 307:

> "It is well settled that a suit in equity for an accounting constitutes an exception to the general rule in equity that affirmative relief will not be granted to a defendant unless he makes claim to it by a cross bill or counterclaim; that a bill, in such a suit, imports an offer on the part of the complainant to pay any balance that may be found against him; that upon such an accounting both parties are actors, and either is entitled, according to the result, to the aid of the court to recover the balance that may be found in his favor; and that it is not necessary for the respondent to file any cross bill, or to set up matter in his answer in lieu of such cross bill. But the rule that the defendant in a suit for an accounting may obtain affirmative relief without filing a cross bill or counterclaim therefor does not apply where the relief granted is not within the scope of the complainant's bill."

A case frequently cited to this point is Goldthwaite v. Day, 149 Mass. 185, 21 N. E. 359, where the court, through Holmes, J., says, 21 N. E. 360:

"When a bill in equity is brought upon a mutual account, the cross-items in favor of the defendant are not matters of set-off. A set-off is a creation of statute. It is an independent claim which the statute allows the defendant to consolidate with the plaintiff's action by pleading it, if he chooses, subject to substantially the same defenses as if he had sued upon it separately. On the other hand, a mutual account exists by agreement, and the effect of it is that the cross-items extinguish each other pro tanto at once, as they accrue. The only claim of either party is to the balance. (citing cases) When a bill is brought upon such an account, it implies that there are items on both sides, and that the balance is uncertain until ascertained by aid of the court. It seeks to have the balance ascertained and paid, and as a condition of being entertained it imports an offer, which formerly it was required to express, on the part of the plaintiff, to pay the balance if it should turn out against him. (citing cases) Under such a bill the defendant has nothing to plead in order to get the advantage of it. His claim is not an independent one, but is admitted and asserted by the plaintiff, provided the items on his side exceed those on the plaintiff's side. Those items are not to be pleaded except when the defendant sets out the whole account in his answer."

That case is followed in Downes v. Worch (1906), 28 R. I. 99, 65 Atl. 603, which is annotated in 13

Am. & Eng. Ann. Cas., at page 648, the introductory paragraph of the note being as follows:

> "It is a well-settled rule in equity practice that a defendant will be granted affirmative relief only on cross-bill. 5 Encyc. of Pl. & Pr. 634. There are, however, several exceptions to this rule, and it has been generally held that a defendant in a suit in equity for an accounting may have affirmative relief without filing a cross-bill or counterclaim therein. This exception is as well settled and uniformly applied as the rule itself."

In McManus v. Sawyer, (D. C., S. D. N. Y., 1915) 231 Fed. 231, 238, Judge Learned Hand said:

> "Moreover, it is a well established rule that a party who demands an accounting submits himself to the result of the account if it goes against him. No cross-bill is necessary, and a decree may go for the balance either way."

The rule that in an accounting no cross-bill is necessary is doubtless an application of the general principle that he who seeks equity must do equity. In Farmers' Loan & Trust Co. [490] v. Denver L. & G. R. Co. (C. C. A., 8th Circ., 1903) 126 Fed. 46, a trustee under a railroad mortgage sought to foreclose upon after acquired property consisting of a shop tract in Denver, upon which Hutchison had a mortgage which was equitably prior. Hutchison was made a defendant and answered, but did not ask to foreclose. The court granted the complainant's

prayer for foreclosure, but conditioned the relief with a provision that out of the proceeds Hutchison should first be paid the amount in which his mortgage was equitably superior to that of complainant. The court said (p. 50):

> "They say that this condition could not be imposed and that the decree ought to be reversed, because Hutchison filed no cross-bill and prayed for no affirmative relief, while the decree directs that $21,049 and interest shall be paid to him out of the proceeds of the sale of the land. It is true that the general rule is that a cross-bill is indispensable to the grant of affirmative relief to a defendant in equity. But there is an exception to this rule, as well settled and uniformly applied as the rule itself. It is that no cross-bill is requisite to the application of the maxim that he who asks equity must do equity. It is that any relief, affirmative or otherwise, may be granted to a defendant which the principle embodied in this maxim requires the court to impose upon the complainant as a condition of granting all or a part of the relief he seeks, regardless of the pleadings which present it. . . . In Morgan v. Schermerhorn, 1 Paige, 544, 546, 19 Am. Dec. 449, the Chancellor said that, where one comes to a court of equity to seek relief against a usurious contract, he must pay or offer to pay the amount actually due, before he will be entitled to an answer as to the alleged usury, and added, 'If a party

comes here to seek equity, the court will compel him to do equity.' In Hudnit v. Nash, 16 M. J. Eq. 550, 553, 555, the second mortgagee exhibited a bill against Nash, the owner of the first mortgage, the third mortgagee, and the owners of the equity of redemption, in which he alleged that the first mortgage was usurious and void. Nash answered that he held the paramount lien, but he filed no cross-bill. The court said, 'But if a party comes into equity and asks relief, the court will compel him to do equity, although the defendant has not demurred to the bill;' that the complainant's decree must be upon terms of paying Nash's mortgage; that no decree could be made except such as could be granted on the prayer of the complainant's bill; and it entered a decree of sale of the premises, and of application of the proceeds, first, [491] to the payment of Nash's mortgage; second, to the payment of the mortgage to the complainant; and, third, to the payment of the third mortgage. This decree was affirmed in the appellate court. No cross-bills are required, to enable the defendants to secure decrees, establishing their rights in suits for accounting, partition, and specific performance. . . . In De Walsh v. Braman, 160 Ill. 415, 43 N. E. 597, Braman exhibited a bill in equity to compel De Walsh and his trustee to convey to him the title to two city lots. De Walsh answered that he had expended $1,118.77 in making improvements upon

the property, which had not been repaid to him, but he filed no cross-bill. Nevertheless, the Supreme Court of Illinois conditioned the decree for a conveyance of the title to the complainant, with the payment to the defendant of the $1,-118.77 and interest. The case in hand falls under the exception to the general rule which these authorities illustrate. Hutchison is not the actor here. He brought no suit, and he has asked no relief, save that he be hence dismissed, and that he have such other relief as may be just and equitable. He was called into the court below by the trust company, which besought that court to decree a sale of the shop tract, which was covered by his mortgage, and to apply the proceeds of that sale to the payment of the debt secured by the mortgage to the complainant. The decree below is founded upon this prayer of the trust company, not upon any claim or prayer of the defendant Hutchison. It directs the sale which the trust company sought, but conditions it with the payment out of the proceeds of the superior equitable lien of the defendant. It grants no relief to the defendant which the rules of equity jurisprudence did not, in the opinion of the circuit court, require it to impose as a condition of granting any part of the relief which the trust company asked with reference to the lien here in controversy. No cross-bill was requisite to warrant the action of the court below."

In Luckenbach S. S. Co. v. The Thekla, 266 U. S. 328, the Luckenbach Steamship Co. and the United States libelled the barque Thekla for a collision with the steamship F. J. Luckenbach and the owners of the Thekla filed a cross-bill against the steamer. Conceding that generally a counterclaim could not be asserted against the sovereign without its consent, the court, citing Goldthwaite v. Day, supra, said that the Government's libel was (p. 340):

> "like a bill for an account, which imports an offer to pay the balance if it should turn out against the party bringing the bill." [492]

As indicated in the general statement quoted above, the rule has no application where the relief sought is not within the scope of complainant's bill. This is well illustrated in Wilcoxon v. Wilcoxon (Ill. 1902) 65 N. E. 229. In a former case the bill was for the dissolution of a partnership and the adjustment of the partnership accounts, and the rule was applied in its full meaning. In a later bill the plaintiff in error sought to annul the articles of partnership, and, to excuse laches, pleaded the former proceeding upon the theory that the relief sought by the later bill could have been granted in the former proceeding without a cross-bill had not the defendants in error, over his objection abandoned it. The court said that in actions in equity for an accounting the prayer of the complainant authorizes the court, if the accounting shows the complainant to be indebted to the defendant, whom he has brought into the court for the purpose of hav-

ing the accounts between them judicially investigated and adjusted, to decree payment by the complainant accordingly, without a cross-bill on the part of the defendant; but that in the instance before it the relief sought by the later bill was entirely foreign to the scope and purpose of the earlier bill, and that therefore the relief could not have been granted in the former proceeding upon a cross bill.

I find that all of the items presented at the hearings leading to this report are germane to the adjustment, and conclude that they are all properly before me for consideration whether specially pleaded or not. [493]

Concessions.

Commencing with the Washington hearing in April and May of last year, the United States introduced exhibits in support of its claim that 63,197.96 acres, formerly within the Greater Sioux Indian Reservation, and which were restored to the public domain, and lay within the first indemnity limits in North Dakota, were patented to the company upon indemnity selections through mistake because the restoration of those lands was restricted to entry under the homestead and townsite laws. It likewise claimed that through mistake in drawing the lateral limits through portions of Montana and Idaho certain acres, aggregating 8,607.71 acres lying entirely outside the limits of the grant, were conveyed to the company in error. It further claimed that the United States had erroneously patented to the company

place and indemnity lands at Portland aggregating 4,295.52 acres, and at Ainsworth aggregating 61,-536.25 acres, the terminal limits in each case having been laid down beyond the point of actual construction of the road. The government contended that its officers were without authority to convey these lands, and that the company should either reconvey or, in cases where it had transferred to bona fide purchasers, should pay value. The company contended, on the other hand, that since the grants had not been fully satisfied, these lands, though possibly patented in error, should be charged to the grant. During the arguments in February of this year, the government waived its claim for reconveyance or compensation, with the result that the lands in question are to be charged to the grant in precisely the same manner as the railway had considered them. Even without such concession, I should have held that, on plain principles of equity, the foregoing classes of land should be charged to the grant un- [494] less and except the government were prepared to tender other lands to make up the deficiency. Since the case was submitted, the government has filed revised exhibits, in which the lands are charged to the grant, so that these questions are removed from further consideration.

In 1873 the railway company built westward as far as Bismarck on the Missouri River. The river itself was treated as the terminal limit for that section of the road. 27,488.62 acres to the west of the river were thus made to fall outside the lands earned

by that construction. Thereafter, in 1876, the acreage in question was withdrawn from entry and included within the Little Sioux or Standing Rock Indian Reservation. In 1880 the road was extended on west past these lands, and they were apparently lost to the grant. In 1898, however, the Land Office drew a perpendicular terminal at Bismarck which threw the reservation lands opposite the earlier construction. The government claimed in effect that the new terminal should control; that title to the disputed lands passed upon the 1873 location; that the company was in position to recover them, and that the lands should be charged to the grant, while the company insisted that the river should be regarded as the terminal as originally considered; that the lands in dispute were lost to the grant; and that it was entitled to indemnity. At the September hearing the government announced that it would not insist upon its position, and in the revised exhibits these lands are treated as lost to the grant.

A question was raised in the pleadings as to whether certain lands fell within or without the Yakima Indian Reservation, depending upon which of two surveys correctly define the southwestern boundary of the reservation. At page 210 of my previous [495] report I pointed out that I was not able to determine from the pleadings whether the lands in question were in fact within or without the reservation. At the hearing in January and February of this year it was orally stipulated during the testimony of Mr. Schwarm, for the purposes of this

suit, that about 22,000 acres should be considered as within the reservation, and, hence, not chargeable to the grant, that 831.95 acres should be considered as outside the reservation and properly selected by the company, and, hence, chargeable to the grant, and that about 1,100 acres should be considered as lying outside the reservation, but as having been put into a national forest, and, hence, subject to the same ruling that may apply to any other withdrawn lands. Effect to this stipulation is given in the revised exhibits.

In the earlier years of the administration of the grants the company was permitted to satisfy losses suffered by the 1870 grant in the indemnity limits in the 1864 grant, and vice versa. By decision December 20, 1897, reported in 25 L. D. 511, the Commissioner was instructed to administer the grants separately. The necessary rearrangement of losses is reflected in the exhibits, which treat the two grants as separate and distinct.

I shall proceed now to the adjustment.

GRANT OF JULY 2, 1864.

Reconciliation as to Extent of Deficiency.

The grant of 1864 is concededly deficient, in the sense that the losses have not been fully satisfied. The United States, after all concessions, by its exhibit 103, revised, fixes the deficiency at 2,111,479.52 acres. The Northern Pacific by its corrected exhibit 132 fixes that deficiency at 2,572,800.87 acres. The difference between the two quantities is comprehended within the following items: [496]

1. Portage, Winnebago & Superior conflict, 417,400.66 acres. The government deducts this area from the grant, while the railway treats it as having been lost to the grant, and thus as constituting proper base for indemnity. Indemnity was, in fact, allowed, but the government insists that other base be supplied, whereby the deficiency would be decreased.

2. Error in Montana place limits, 5,435.46 acres. The government shows that certain townships in Montana contain more than the conventional number of acres. The railway, admitting that excesses exist in the particular townships in that quantity, maintains that elsewhere in the grant many townships are deficient and that no allowance should be made by reason of the greater or less number of acres per township. Of course, the effect is that the government's position would reduce the deficiency by that quantity. This contention must be distinguished from the Montana and Idaho lateral error involved in the concession mentioned above.

3. Lieu selections in indemnity limits, 38,485.23 acres. This acreage constitutes lands selected by the railway within the indemnity limits of the grant in lieu of lands relinquished under so-called relief acts, which entitled the company to make selections in lieu of lands relinquished by it to settlers. The United States argues that since the company could have made such selections elsewhere than in its own indemnity limits, it should be charged to the extent by which it thus depleted its limits, while the company contends that since, by the terms of the relief

acts, it was not excluded from its indemnity limits in making such selections, it should not be charged for making them there. The government's position would reduce the deficiency by the quantity involved. The company would disregard [497] the circumstance entirely as having no bearing whatever upon the quantity of the deficiency.

These three matters I shall now discuss, in order to arrive at what I consider a correct statement of the deficiency.

I. Deduction for Portage, Winnebago & Superior Grant.

In my first report, speaking only to the pleadings, of course, and not to the actual facts, I held that upon the filing of the map of definite location by the Portage, Winnebago & Superior Railroad Company the title passed to it subject to be defeated only by failure to construct, and that thereby the lands fell within the terms of proviso 1 of Section 3 of the Act of 1864, deducting land previously granted, if the route of the Northern Pacific should be found upon the line of any other railroad route to aid in the construction of which lands had theretofore been granted, as far as such routes were upon the same general line.

By Your Honor's Order upon that report this became the law of the case. I cannot refrain, however, from calling attention to the case of United States v. Southern Pacific Railroad Company, 146 U. S. 570. In that case the senior grant was to the Atlantic & Pacific. A junior grant was made to the Southern

Pacific. The former company filed its map of definite location. It did not, however, construct its road, and its grant was afterward forfeited to the United States. The Southern Pacific filed its map of definite location and did build its line upon that route, and thereupon claimed to have earned the lands which the Atlantic & Pacific had lost by its failure to construct. The Supreme Court, speaking by Mr. Justice Brewer, held square-toed that, by the filing of the map of definite location under the [498] senior grant, the title passed to that grantee, and, therefore, that the junior grantee could by no possibility get any of the land. It was held further that the failure of the Atlantic & Pacific to build, and the forfeiture of its grant, did not in any wise change this rule; that the forfeiture was not made for the benefit of the Southern Pacific, but for the benefit of the United States. In that case there was a proviso in the junior grant that its grant should be subject to the rights of the Atlantic & Pacific. This proviso, however, was not dealt with as having any bearing, although an impression is left that it might have had some effect. In the subsequent cases of United States v. Colton Marble and Lime Company and United States v. Southern Pacific Railroad Company, decided together and reported in 146 U. S. 615, that clause was held to have no bearing whatever upon anything but indemnity lands. Thus the determination that the place lands, by reason of the definite location of the Atlantic & Pacific line, did not pass to the Southern Pacific was not in any

wise affected by that proviso. These cases, though cited to other points not requiring that they be critically examined, were not called to my attention at the previous hearing as touching this question; and I believe were not called to Your Honor's attention at the argument on the exceptions to my report. It is, therefore, with some degree of satisfaction that I am able at this time to point out how precisely the determination of the question by the Supreme Court of the United States confirms the correctness of the view we took. Of course, under the proviso in Section 3, which we are considering, it must be remembered that the land in question, by the very terms of the act, is deducted from the grant. Nothing was received, and, hence, no indemnity could be claimed. In that respect the cases differ; [499] but upon the proposition that on filing of the map of definite location title passed to the senior grantee as of the date of its grant so that nothing could pass to the junior, the cases are identical.

At this point and upon the question of fact involved, Govt. exhibit 76 shows the precise situation. Area A and area B together constitute an aggregate of 370,378.05 acres, approximately the quantity alleged in the bill. The United States now claims that not only areas A and B, but also area C should likewise be deducted from the grant, bringing the total deduction to 417,400.46 acres. In argument Mr. Frost maintained that, while the two roads were parallel down to range 11 east, from that point, by

reason of the divergence in a northwesterly direction to Bayfield of the located Portage road and the almost directly eastern course of the Northern Pacific to Ashland, they were not on the same general route. I hold that they are. We must consider the condition of the country at this time, and what Congress had in mind. There were no railroads in that portion of Wisconsin. The grant to the Portage road was to afford railroad facilities for that portion of Wisconsin along Lake Superior. The distance between the termini of the two roads is about 17 miles. While, as it appears on the map, it looks like a very sharp departure from parallelism, I think it must be said certainly that 17 miles difference between the termini does not take it away from the same general direction, using the word "direction" as equivalent to the word "line", as employed in the act. The people of that day, the Congress of that day, did not suppose that any community needed a road every two or three miles. That was an unheard-of and undreamed-of luxury for the times. The pioneer farmer, if he could get within 17 miles of a [500] railroad, thought he was fortunate. Without elaborating on the subject, it seems to me perfectly evident that these two routes are upon the same general line. Therefore, without question area A, 347,-141.24 acres, must be deducted from the grant. Area B is sought to be deducted because it is said the road between Bayfield and Ashland is a part of the same general line. I do not think so. I think the routes ended at their respective termini, and that

only the land that was comprehended within the grant to the Portage road to Bayfield should be deducted. It follows, of course, that area C should not be deducted. I have not been able to understand the contention of plaintiff in respect of that area. Therefore on this point I hold there should be deducted from the grant 347,141.24 acres, thus reducing the area of the grant, and consequently the deficiency, by that number of acres. In order to dispose of all questions arising in this Portage issue, I may add that the bill sought to obtain judgment against the railroad for the value of the lands secured as indemnity for the supposed loss to the Portage road. On argument the plaintiff now concedes that the company may keep these lands, claiming only that it shall assign proper base for its selections. I shall have occasion to determine later on in this report what is proper base, and whether any base is needed. I only call attention to that question now without undertaking to determine it.

II. Error in Montana place limits, 5,435.46 acres.

This figure is the estimated excess area in certain townships in place limits in the state of Montana. In 1925, during the process of adjustment in the general Land Office, it was found [501] that an error had been made by the Commissioner in laying down the northern and southern lateral limits for a considerable distance through Idaho and Montana at the time the road was definitely located. The country not having been then surveyed, the Commissioner determined the limits by protracting or extending

existing lines of survey. To correct the convergence of the meridians of longitude because of the earth's curvature, a jog is taken to the east or west at regular intervals of four townships, or twenty-four miles. By mistake the Commissioner placed the jog in the wrong direction, so that when the survey was made, and superimposed upon the Commissioner's map, the latter was shown to be in error. The result was to throw certain lands formerly considered place lands into the first indemnity limits, first indemnity lands into second indemnity, and second indemnity lands outside the grant. About 145,000 acres were thus shifted from one limit to another. The quantity patented outside the limits was 8,607.71. This is the quantity for which the government originally asked compensation, as for lands erroneously patented, but which, in argument, as stated above, it conceded might be charged to the grant.

The 5,435.46 acres is a different item, but is related in the sense that it is an extension eastward of the same error. The Land Office corrected the limits for a distance, and then estimated the error beyond at 13,312 acres, finally reduced in testimony to 5,435.46.

The item as originally estimated was deducted from the adjustment for the state of Montana and, in consequence, the adjustment for the entire grant, transmitted by the Secretary of the Interior to the Joint Committee of Congress as a preliminary report March 8, 1925, as is shown at pages 386 and 391 of the report of the Joint Committee hearings.

[502]

The railway objected to the proof upon the ground that the item was not alleged, but for reasons given above I overrule that objection.

Mr. Schwarm for the company testified that certain townships were over-size, his testimony corresponding closely with that of Mr. Barber for the government; but he claimed, generally, that other townships along the entire line were short of the conventional acreage. The company did not offer evidence of any specific instances, although Govt. exhibits 229 and 230 themselves show that along certain portions of the road the new lateral lines would actually enlarge the place limits. I think it may be regarded as a matter of common knowledge that in the public land states, by reason of convergence of meridians and errors in survey, the north and west tiers of sections making up the township are always, or at least usually, either over, or short of, 640 acres; but as to whether in the aggregate the quantity would be over or short I have no knowledge and do not consider the railway's evidence as sufficient to show it. The testimony and statements of counsel concerning this error are found at the following pages of the transcript: 27, 148-149, 320, 329-339, 601, 733-746, 880-881, 918-919, 1049-1050, 1435-1437.

Neither orally nor in its brief did the government advance any argument concerning this item, though requesting a finding that it be deducted. The company, in its brief, insisted that the original place limits as established by the Land Department ought

to control, and requested a finding that the evidence was insufficient to justify a correction.

From the outset the company has freely conceded the Idaho-Montana error, where the lateral limits were actually re-drawn. [503] It is testified that the present error is an extension of the former. The company has, in substance, admitted the error and has not offered definite proof to establish any compensating error. While it is difficult to conclude that the quantity of place lands thrown into the first indemnity limits represents the actual area erroneously received by the company, yet no contention was made as to that, and for all that has been said my difficulty may not involve any valid objection. An error being admitted, and the witnesses for the government and the railway being practically in accord as to the excess in the place limits, I feel compelled to find as requested by the government and shall so rule.

III. Lieu Selections in Indemnity Limits, 38,485.23 acres.

Congress passed several acts, called generally relief acts, for the relief of settlers occupying lands which fell within the limits of railroad grants upon the filing of maps of definite location. As will be recalled, the railroad title, on the filing of the map of definite location, attached as of the date of the grant. If in the meanwhile a settler had entered, the relief acts came to his aid by providing that the railroad, upon relinquishing to him, might select

other lands in lieu of those relinquished. The first of these was a general statute of June 22, 1874, 18 Stat. 194, which may be found in the Joint Committee Record (J. C. R.) at page 79. An extension to other situations was made by the act of August 29, 1890, 26 Stat. 369, J. C. R. 82. The act of October 1, 1890, 26 Stat. 647, J. C. R. 85, contrariwise, permitted the settler to leave the railroad land and transfer his rights elsewhere. The act of July 1, 1898, 30 Stat. 620, J. C. R. 89, is the one most often invoked. It provides that [504] where the purchaser, settler or claimant refuses to transfer his entry, "The railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished, an equal quantity of public land, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim or not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends, * * *," and further, that the Secretary of the Interior ascertain and cause to be prepared and delivered to the railroad grantees list of tracts which had been purchased or settled upon or occupied. Extensions of that act and certain relief acts of limited application may be found for convenience at J. C. R. 91, 92 and 93.

In exercising such lieu rights the Northern Pacific selected 38,485.23 acres within the indemnity limits, though, as illustrated by the act of July 1,

1898, it might instead have made its selections out of even-or odd-numbered sections, surveyed or unsurveyed, within any state or territory into which the grant extended. Some of the selections in question were made before the land was surveyed, and a preponderant part was selected within areas that afterward, when the second indemnity limits in Montana and Idaho were established, fell within those limits. Some selections also were made within areas in Wisconsin and Minnesota that afterward became mineral indemnity limits. Of the entire 38,485.23 acres, only 1,634.23 acres were selected when the land was surveyed and available for selection under the indemnity provisions of the grant.

The United States deducts the area in question from the deficiency in its recapitulation of the statement of the adjustment for the several states, and for the grant as a whole. Thus, Govt. [505] exhibit 103 revised, for the entire grant of 1864, carries it as follows: "Deduction, area within the odd sections of the primary and indemnity limits, selected by the company under lieu acts . . . 38,485.23." As heretofore stated, the company makes no deduction from the deficiency by reason of these selections. The government did not mention this issue either in oral argument or in its brief. In the railway's brief attention is called to the fact that the 1874 relief act, cited above, by its terms, as interpreted by the Land Office, provided that the selections might be made within the limits of the grant and in either even or odd sections, and that the 1898

act and similar acts under which the selections were made contained no specification except, as in the 1898 act, that the selections might be made within any state or territory into which the grant extended, and contends, therefore, that the company had the option of selecting either within or without its limits. It claims also that the grant has been charged with the acreage for which the lieu scrip was issued, and that to charge again for the selection would result in a double charge.

Neither party proposes a finding upon this subject, except only as a finding thereon would be implied in the company's request for ascertainment of the quantity of the deficiency.

The company's claim that a double charge results from the plaintiff's treatment of these selections appears to be well taken. The United States was not injured by the selections, because it was spared the selection of equivalent land elsewhere. The company did diminish its indemnity limits when it made relief act selections therein, but it is not complaining nor asking for any compensating indemnity elsewhere. I find no reason for the deduction, and rule that none should be made. [506]

The rulings which I have made upon the three foregoing points enables me now to state the deficiency under the grant of 1864:

	Acres	Acres
Deficiency as calculated by plaintiff		2,111,479.52
Add: Portage, Area B	23,236.81	
Portage, Area C (Tr. 86)	47,022.61	
Selections under relief acts	38,485.23	108,744.65
Deficiency		2,220,224.17
The same result is reached by comparison with the deficiency as calculated by the company, or		2,571,765.46
Less: Portage, Area A	347,141.24	
Montana place error	5,435.46	352,576.70
		2,219,188.76
Add: Selected lands charged by company but conceded by it to be mineral		1,035.41
Deficiency		2,220,224.17

The deficiency thus found is represented by unsatisfied losses in the hands of the company, as follows (N. P. exhibit 138 revised; Tr. 944):

Unsatisfied prior losses in entire grant		106,828.08
Unsatisfied subsequent losses in states not having second indemnity limits:		
North Dakota	7,618.00	
Washington	85,659.25	
Oregon	2,851.92	96,129.17
Unsatisfied subsequent losses in states having second indemnity limits:		
Wisconsin	6,400.66	
Minnesota	219.92	
Montana	124,992.06	
Idaho	23,922.22	155,534.86
Unsatisfied mineral losses		2,258,356.88
Total unsatisfied losses—Forward		2,616,848.99

Total unsatisfied losses—Forward	2,616,848.99
Less: Portage, Winnebago, and Superior Area A	347,141.24
Net unsatisfied losses	2,269,707.75

Now, this statement of unsatisfied or unindemnified losses is not intended to be exact. It is taken from the company's revised exhibit, supplemented by Mrs. Schwarm's testimony, without reconciliation with plaintiff's exhibits, which were prepared before the numerous concessions and other revisions had been made. I think possibly I should deduct from the net total the area of 40,623.10 acres within the indemnity limits patented to St. Paul & Pacific Railroad Company which after suit (139 U. S. 1) conveyed to the Northern Pacific without the latter's designating base. This would reduce the net unsatisfied losses very nearly to the ascertained deficiency. Yet even if all the figures were brought down to date and reconciled, the unsatisfied losses would never precisely equal the computed deficiency, because in matching losses and selections the area of the loss did not always exactly equal the area of the selection, and because clerical errors inevitably occurred in the administration of the grant. Roughly, the ascertained deficiency corresponds with the losses on hand. The purpose of setting forth the unsatisfied losses is to show that they are of several kinds, and that the greater part is mineral.

IV. Lands Selectable for Mineral Losses; Meaning of "Agricultural Lands".

The deficiency in the grant having been ascertained, the problem is, where and how may the railroad make it up? The United States contends that even if the national forests and other govern- [508] ment withdrawals are open to the invasion of the company for this purpose, it is quite impossible to satisfy any considerable portion of the deficiency, because the lands sought to be taken are of such character that, under the terms of the act, they cannot be selected for the particular losses that the company has on hand. Thereupon various questions arise, around which the controversy rages, for the purpose of determining whether this contention of the government is correct or whether, on the other hand, the railway may take these lands in satisfaction, in whole or in part, of this deficiency.

What is the interpretation to be placed upon the phrase "agricultural lands" in the third proviso to Section 3 in respect of the selection of indemnity for mineral losses? The language is:

> "Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and, in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, and within fifty miles thereof, may be selected as above provided."

The lands to which this interpretation is to be applied are principally that vast tangle of mountains and forests, and rivers and valleys, contained in the national forests of the United States, beginning with the Custer on the east, and extending in almost unbroken connection to the group of forest reservations along the Cascade range. In general, the lands may be identified as the hatched portions of the national forests shown upon Govt. exhibit 88.

The United States appeals to the ancient and fundamental rule of statutory construction that words are to be taken in their literal meaning or according to their common usage, as the subject [509] and the context and the surrounding circumstances may require, but that where both the dictionary sense of the term and common usage are identical, there is no room for interpretation, and the language used must be deemed used in that precise sense and no other.

On the other hand, the company maintains that the expression is one of classification, not of definition; that the term "agricultural" is used in distinction to the term "mineral", and was intended to denote all lands not mineral in character within the meaning of Section 3. The question thus raised is of controlling importance because if the government's contention be sustained, there is no place that the company may go to satisfy the bulk of its deficiency, and it will be quite useless, until this question is determined, to discuss the other questions that arise.

Preliminarily to an analysis of that language and of the authorities cited one way and the other concerning it, I shall consider specific cases comprehended on the one hand by the term "mineral", and on the other by the term "agricultural".

The expression "mineral lands" has been given a very broad interpretation as including not only metalliferous lands, but, as well, lands valuable for deposits not metalliferous, including marble, slate, building stone, clays, petroleum, asphaltum, phosphate, and such an exceptional instance as guano. For a comprehensive, sweeping, determination of what is mineral, one should read the opinion of Mr. Justice Brown, with its wealth of illustration, and its citation of authorities going back to the early English cases, in Northern Pacific Railway Company v. Soderberg, 188 U. S. 526, in which it was held that a portion of a [510] certain odd-numbered section within the place limits of the grant of 1864 in the state of Washington, valuable solely or chiefly for granite quarries, was mineral.

Similarly, the term "agricultural" has been given equally broad signification. Thus, under the homestead law, in applying the requirement of "cultivation", which etymologically has the same origin, in part, as "agricultural", the Land Office has permitted entries upon plow lands, grazing lands, lands chiefly valuable for timber but which, upon removal of the timber, are tillable, and quite liberally all lands which the settler might wish in good faith to occupy as a home, however erroneous his judgment

might be as to the fitness of the lands for cultivation. The usual instance in which his application has been questioned is where the value of the land for timber was such as to have raised a question of his good faith.

Notwithstanding the wide interpretation given to the two terms, you come at last to a sort of no man's land, neither mineral nor agricultural under any possible definition of those expressions. In this case the no man's land comprises much of the lands in N. P. exhibits 144 and 146, by which the company seeks to lay mineral losses directly upon first indemnity and mineral indemnity lands within forest and other reserves. It may also comprise a substantial part of the lands described in N. P. exhibit 145, by which the company seeks to lay mineral losses upon first indemnity lands not embraced in reserves, in substitution for subsequent losses used long ago in the selection of such lands, in order to release those losses so that they may be used to take up second indemnity lands within reserves which, by reason of being more than fifty miles from the road, are not [511] selectable directly for mineral losses; for the government in its argument upon the subject of substitution or rearrangement of base makes the same objection to these substitutions that it makes to selections under N. P. exhibits 144 and 146, viz: that the company has failed to sustain the burden of proving that the lands sought to be supported by mineral base are agricultural.

The selections under N. P. exhibits 144 and 146 in first indemnity and mineral indemnity aggregate

1,340,000 acres, of which about 10,800 acres, or less than one per cent, are classified agricultural by the government in its testimony and its exhibits 237, 244 and 248:

Mineral Selections in First and Mineral Indemnity Limits Within National Forest Boundaries:

Forest	Acres Agricultural	Acres Non-Agricultural
Kaniksu	Nil	54,027.39
Pend Orielle	40.	1,379.05
St. Joe	Nil	52,044.12
Clearwater	2,720.	115,876.45
Selway	224.	80,880.29
Kootenai	1,161.	36,347.80
Blackfeet	Nil	12,646.45
Flathead	4,625.	190,326.04
Lolo	Nil	25,527.23
Lewis & Clark	Nil	41,080.
Helena	Nil	9,180.
Deerlodge	361.	37,913.12
Jefferson	454.20	86,390.35
Beartooth	80	127,970.95
Absaroka	129.30	198,217.59
Gallatin	Nil	39,684.
Madison	Nil	7,670.54
Bitter Root	Nil	31,863.36
Shoshone	240.	47,807.99
Snoqualmie	Nil (Approx.)	57,200.
Wenatchee	1,128.67 "	53,400.
Rainier	Nil	25,600.
Totals	10,803.17	1,333,032.72

[512]

The aggregate of the proposed substitutions is approximately 664,000 acres additional, with respect to which the government insists that the company

has failed to offer any proof of agricultural character. The issue, therefore, involves in all about 2,000,000 acres.

Counsel for the government have appealed to the dictionary sense of the word "agriculture", and have gathered together the dictionary definitions beginning with Dr. Johnson, in 1755, down to and including that vast repository of word knowledge, the Oxford Dictionary. Thus, Dr. Johnson: "the art of cultivating the ground; Tillage; husbandry," the Oxford: "the essence and art of cultivating the soil; including the allied pursuits of gathering in the crops and rearing live stock; tillage; husbandry; farming, (in the widest sense)," and the Century: "the cultivation of the ground, especially cultivation with a plow and in large areas in order to raise food for man and beast; husbandry; tillage; farming," and it is argued that agricultural lands mean lands that may be subject to the pursuit of agriculture in the sense of these definitions. I do not think it is at all possible to adopt this dictionary sense. It would be quite contrary to known conditions existing in the territories in which the grant to the railroad was to be located. Whatever the word "agricultural" means, it certainly means much more than this.

So, likewise, the cases cited in support of their construction of the phrase "agricultural lands" cannot throw much, if any, light upon the subject. Those cases all arise under the timber and stone act, the homestead law, or other specific legislation in

which it becomes necessary to compare the value of the land for tillage and its value for some other statutory purpose. [513]

In further application of their contention counsel put in evidence the testimony of the foresters who had classified the lands in these various reserves under another statute, and for a different purpose than any involved here. The classification was into agricultural and non-agricultural lands. Their testimony is intelligent; their classification was apparently made with care and accuracy. They introduced airplane pictures taken over these national forests, and when one has become accustomed to the perspective, they show a condition familiar to Your Honor and to me. One sees from those pictures the small areas of valley land, strictly agricultural according to the definition. The foresters admit only some 10,000 acres in all this vast area to be of this type. One sees the conifers in solid growth, their trunks almost touching one another in the valleys, extending up the mountain side, the species changing as they reach the higher levels in the age-old struggle of their forebears to reduce the rock of the mountains to the soil of the valleys. One observes the mountain tops of solid granite, or, in some of the lower levels, of volcanic rock. In these regions, as shown by the photographs and as known to men familiar with them, there is nothing to suggest the conception of "agricultural lands" or of "agricultural" as defined by the dictionaries, or as commonly understood; nothing to suggest the idea of

the spring time and the harvest, of the plowing and the sowing and the reaping; nothing to suggest the fixed habitation of man with his homes and his outbuildings, his fences and cultivated fields. Rather one's mind goes to the nomadic tribes, like the Jews of Abraham's time, living in tents and following their flocks into the hills and along the river valleys for grass and water. One thinks, too, of the cedars of Lebanon [514] and of the mighty forests of redwood which once covered the Pacific slope from California to the Bering Sea.

Counsel cite various speeches in the Congress that was considering the act, particularly referring to the description by Governor Stevens of these lands and his insistance upon the area of tillable lands, and to the account that Captain Mullan gave. They cite, too, certain language from various decisions of the courts. From it all they conclude that, with the exception of a few scattered tracts, the term "agricultural lands" cannot be applied to the lands in these reservations, and that they, therefore, cannot be selected for mineral losses.

I am not greatly impressed with the argument founded on what was said by various members of Congress touching the agricultural lands to be found along the line of the road west of the Missouri River. Doubtless they were appealing, with the strongest arguments they could think of, to Congressmen from the northeast and middle west, to vote for the bill. Even if their fervor of expression was justified, it does not necessarily follow that

what they said applies to the unselected lands now lying in the indemnity limits of the grant. I have already expressed the opinion that the dictionary sense of the words "agricultural lands" is not sufficiently broad to cover the intent of this phrase. About that matter I have no sort of doubt, but if we extend that phrase to cover, under certain circumstances, pasture land, and, under other circumstances, timber lands susceptible of cultivation after the timber is removed; in short, if we give it its widest possible significance according to the dictionaries and the decisions of the courts and the Land Office, I still think it does not come up to the purposes of Congress. [515] I think it is too narrow; I think it excludes too much. My views upon the whole question will be more fully stated presently.

Mr. Frost refers to two other land grants containing the identical proviso we are considering. It does most certainly appear that the phraseology had become established so that it was used without any question as late as 1871. No controversy had arisen over it, and Congress and the Land Office, as well as other railroads applying for grants of land, seemed content with the phrase as it stood. From the beginning of the administration of this grant it was consistently the understanding of Land Commissioners and Secretaries of the Interior that the phrase was one of classification and was intended to mean, and it was held did mean, all lands not mineral in character. In a sense, therefore, I may remark in passing, when subsequent statutes used

the same phrase they took it as construed by the Department. Now it is quite true that, by the terms of the act under which this suit is brought, this court is required to correct all errors of construction and administration, whether of law or of fact, committed by the Land Department of the government, but that does not mean that there shall be no persuasive force, no effect whatever, given to the rulings of that department. It means only that where they are manifestly wrong, the court shall so adjust the grant as to correct such errors.

It must be continually borne in mind that, when this grant went into effect, the United States was engaged in a terrific conflict to preserve its own existence. It must be remembered that, when the resolution of 1870 was adopted, the war had been over but five years. Now, out of that struggle came wounded and disabled soldiers, thousands upon thousands of them. Other thousands [516] upon thousands had left their homes and occupations, many of them as young men, and had come back with no place to go nor any occupation to follow. In great part it was the intention of these grants to the Northern Pacific to open up a country where these returning soldiers might find homes, and make settlement, and build up new commonwealths to be added to the Union. The whole spirit of the act breathes that purpose, just as plainly as it does the policy towards mineral lands, thus stated by Mr. Justice Field in Barden v. Northern Pacific Railroad Company, 154 U. S. 288, 318:

> "The tract granted covered a belt believed to be rich in minerals of gold and silver, and the United States were at the time engaged in a terrific conflict for the preservation of the Union, incurring an immense debt, exceeding two thousand millions, and many of their citizens, engaged in the struggle, looked forward hopefully and confidently to this source for relief to the burdened treasury. And we cannot with reason suppose that, under these circumstances, the United States intended that the control of this source of wealth and relief should be taken from them. It passes belief that they could have deliberately designed in this hour of sore distress and fearful pressure upon their finances, to give away, to a corporation of their own creation not only an imperial domain in land but the boundless wealth that might lay buried in the mineral regions covered by 80,000 square miles."

This language is not at all weakened by the fact that the forces of private greed and gain so altered the policy of the government that its mineral resources were thrown open to public exploitation.

It might be remarked in passing, too, that this language is consistent with the settled practice of the Department and government officials in putting agricultural lands and mineral lands in opposition to each other.

I see no reason why one policy should apply to the place limits and another to the indemnity limits.

All lands within [517] the place limits passed by the grant, except mineral. Why should a different policy be thought to apply with respect to the indemnity limits, except that the coal and iron exclusion is compelled by the use of the word "agricultural" as opposed to "mineral"?

It is certain that the Interior Department was administered, at the time of this grant and for many years thereafter, by men who had lived through the trying years of the Civil War, many of whom had taken part in it, Secretaries, Commissioners of the General Land Office, and heads of bureaus in the Department. I think it ought to be assumed that these men were more familiar with the intention of Congress than we are to-day. I think great effect should be given to the construction which they placed upon this phrase, and to the manner in which it was consistently and continuously, down to the passage of the act under which this suit was brought, administered by them. Of course, we may observe in the opinions of Commissioners and Secretaries, in individual cases, a tendency in after years to tighten up on this construction to limit it as far as possible. Times had changed, views had altered, other questions had obtruded themselves upon the construction of this grant. Hostility against railroad grants and railroad usurpations had been gathering, and it is only to be expected that, to a certain extent, this sentiment should be reflected. I cannot believe that the men who administered this grant through the early

years could have been mistaken as to the intent of Congress.

Much argument is made by the government to the effect that the Department had under its control and administration all the public lands of the United States, running into millions and millions of acres, that they had not the time to give careful [518] attention to each subject, that they took the grant as meaning what the company said it meant, and, so to speak, let it go at that. I cannot think that this is a just explanation of the opinion entertained by the officials of the Land Department. It is apparent that for many years—I will not stop to run back and see how many—the administration of railroad grants was committed to a special division of the General Land Office. It had heads and it had counsel. They gave careful attention, as the reports of the Department show, to each detail and to each step of that administration. I am persuaded that the interpretation placed upon this phrase was intentional and upon deliberation.

There were no timber and stone acts, no desert land acts, no acts of Congress throwing open to settlement and exploration under any particular regulations the mineral lands of the United States. There were no forest reserves nor game preserves, no thought or idea of maintaining watersheds. All the various complications in the administration of the public lands of the United States were introduced long after this act, and in view of considerations that obviously had never occurred to the exec-

utive or legislative branches of the government. To undertake to construe this part of the act in the light of all this subsequent legislation, of all the subsequent proclamations creating forest and other reserves, is futile.

The argument is made that the construction of the phrase "agricultural lands," if used in opposition to mineral lands, would mean only "other lands," and that mineral indemnity losses might as well, therefore, have been put in the same clause, and in the same connection, as the indemnity provision for general losses. By the general indemnity clause in Section 3, it is en- [519] acted that whenever prior to the definite location of the road any of the sections, or parts of sections, shall have been "granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of," other lands should be selected by the company in lieu thereof, and the argument runs that there was no necessity for a separate proviso for mineral losses. This, to my mind, taken at its face value, and as stated, is a powerful argument and difficult to answer; but even taken at its face value and with all the force that is conveyed by the manner of its presentation, I still think that it is not sufficient to overcome other considerations. An analysis of Section 3 will disclose that the argument is specious rather than sound. By the general indemnity provision quoted above, it would result that the company might select any lands, mineral as well as non-mineral, for those losses because the unqualified

phrase is "other lands" not more than ten miles beyond the limits. Now, by construction it has always been said, and it must be held, of course, that the words "other lands" do not include mineral lands, except coal and iron, because by the terms of Section 3 mineral lands are excluded from the operations of the act. Coal and iron lands would thus have been excluded were it not for the addition that mineral should not be held to include iron or coal. If, therefore, the phrase "agricultural lands" were equivalent to the phrase "other lands," it would follow that for mineral losses the company might select any other lands, including coal and iron, and that only minerals other than coal and iron would be excluded from selection.

For some reason, however, Congress did not intend this result, and by the use of the term "unoccupied and unappropriated agricultural lands," within prescribed limits, it meant to exclude [520] from the selection for mineral losses all mineral lands, including coal and iron. To put the whole provision in plain and direct language, the effect of the statute, if agricultural lands be construed as used in opposition to mineral lands, is this: for the general losses in place, the company might select any other free lands in the indemnity limits, including coal and iron, but not other mineral lands; and for mineral losses it might select within the limits any other free lands non-mineral in character. Thus the only difference between the indemnity provisions for general losses and for mineral losses is the coal and

iron lands. The only difference in location is the difference expressed in the words "within fifty miles thereof" for mineral losses, and "not more than ten miles beyond the limits" for general losses. The same idea might have been expressed, instead of the short phrase "agricultural lands," by a circumlocution, as, for instance, "other lands not mineral in character, and not coal and not iron," thus making sure of the difference between the selection for mineral losses and for general losses. Construing the phrase "agricultural lands" as I have construed it makes it mean precisely that, nothing more and nothing less.

As I read the opinion of Secretary Ballinger in Northern Pacific Railway Company, 39 L. D. 314, he held to the same construction, so far as it was necessary for him to consider it in that case. The question before him was whether admittedly coal lands could be taken as indemnity for mineral losses. Conceding that for general losses they might be so taken, he ruled that for mineral losses they could not be selected because they were not agricultural lands. This was as far in the analysis of the term "agricultural lands" as it was necessary for him to go, and noth- [521] ing more is to be made out of the opinion than just that.

Concededly, the term "agricultural lands" may be read in the sense the government attaches to it; but obviously within familiar rules of construction it may be read as a term of classification. The whole thing turns on what Congress intended in the use of

the phrase. There are certain fundamental rules of construction, reference to which may be useful here. Sir William Blackstone thus states the rules I have in mind (Bl. Comm., Introd., Sec. 2);

> "The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by SIGNS the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all:—
>
> 1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf which forbad a layman to LAY HANDS on a priest, was adjudged to extend to him, who had hurt a priest with a weapon. Again, terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited 'to the princess Sophia, and the heirs of her body, being protestants,' it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words 'heirs of her body,' which, in a legal sense, comprise only certain of her lineal descendants.
>
> 2. If words happen to be still dubious, we may establish their meaning from the CON-

TEXT, with which it may be of singular use to compare a word or a sentence, whenever they are ambiguous, equivocal or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is; and, when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony.

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3. As to the SUBJECT MATTER, words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. Thus, when a law of our Edward III. forbids all ecclesiastical persons to purchase PROVISIONS at Rome, it might seem to prohibit the buying of grain and other victual; but, when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by the pope were called PROVISIONS, we shall see that the restraint is intended to be laid upon such provisions only.

4. As to the EFFECTS and CONSEQUENCE, the rule is that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' was held after long debate not to extend to the surgeon, who opened the vein of a person who fell down in the street with a fit.

5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the REASON and SPIRIT of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius. There was a law, that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By change the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason

> of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to its preservation."

I think the phrase "mineral lands" as used in this Statute is a technical term as defined by Blackstone; certainly it is as construed by the courts in the opinions and instances to which I have previously referred. Certainly in a popular sense guano, asphaltum, granite and lime stone are not minerals. In the ordinary use of the word "mineral", the widest possible sig- [523] nificance includes only the precious minerals, or, at most, all metalliferous substances. Possibly it might be conceded that coal and iron would be popularly included, but I think that beyond that the phrase "mineral lands" has to be construed within the principle stated by Blackstone in the foregoing quotation. Of course, the words "agricultural lands" in their popular sense include all sorts of land that are capable of tillage, or that are capable of being reduced to tillage although in their native state they are untillable. Nobody doubts, I should suppose, that the vast areas of the original hardwood forests of Ohio, Indiana and Kentucky, were agricultural lands in the popular sense, whether in a dictionary sense or not. I suppose that nobody ever thought that the stony and rocky hills of Vermont and New Hampshire were not, at the time of settlement, or are not now, agri-

cultural lands. In popular speech we speak of excellent agricultural land, of poor agricultural land, and sometimes of fair agricultural land. Like almost every other thing in nature, it has its degrees. Perfect agricultural land is seldom found. It ranges all the way from the very poorest and most stubborn, yielding scarcely an existence to the cultivator, to the rich farming land of the Mississippi Valley, where the slightest effort of the husbandman is returned many fold.

I am particularly impressed by the rule indicated by Blackstone, that an interpretation leading to an absurdity should be avoided. It is a strange thing in the history of law, as in the history of other human institutions, how often, after the lapse of centuries, the same questions repeat themselves and the same doctrines must be re-applied. No possible enlargement upon the subject of the principles just quoted from Blackstone could [524] equal the review of the whole subject by Mr. Justice Brewer in Church of the Holy Trinity v. United States, 143 U. S. 457, where, after pointing out that the transaction was strictly within the terms of the statute, as ruled by the court below, it was held that a contract by Trinity Church in New York City with an alien residing in England, for the latter to enter into the service of the church as rector and pastor, was not within the meaning of the statute making it unlawful

> "for any person, company, partnership, or corporation, in any manner whatsoever, to pre-

> pay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia."

There will be found practically every case that is accustomed to be used in illustration of this subject. When I first came to the consideration of this question months ago, I thought I must give some meaning to the word "agricultural" that brought it within its literal or popular understanding; that whether it was used as a word of classification or not, it was yet, if not strictly used as a word of definition, intended to restrain and to limit the kinds of lands that might be taken. Upon reflection, however, and after much thought and consideration of the arguments and of all the illustrative cases put to me by counsel, I have come to the confirmed opinion that within the doctrines of construction there stated it must be deemed purely a term of classification. Briefly put, why should Congress restrain the railroad from making up its mineral losses in the barren and unproductive mountain regions where they occurred, and require it to go into the rich [525] farming lands of Wisconsin, Minnesota, Da-

kota and central Washington. What purpose of object could be subserved by that, except to deplete the valuable lands that would otherwise be left open to settlers and to preserve what to that Congress were lands utterly valueless. I think such a construction leads to an absurdity. To borrow a suggestion from Mr. Justice Brewer in the Trinity Church case, I think that if the question had been put up to Congress, if somebody had proposed an amendment to the act saying that no worthless land should take the place of these mineral losses, that no barren mountain tops should be taken instead of them, but that the railroad should be confined in the selection of lands in lieu of mineral losses to strictly agricultural farming lands, he would have found not one voice or vote in support of the motion. I think it too clear for argument that any senator or Congressman to whom the proposition might have been put in that July of 1864, that the phrase forbid the railroad to take worthless land and required it to accept only what, to the mind of the Congressmen of that day meant the most valuable lands, would have repudiated it and hastened to offer an amendment to make it clear. The whole thing seems to me grotesque in its conception. I can but wonder if counsel can seriously consider that if, in 1876, and in 1880, and even in 1890, the railroad had proposed to take this sort of lands, the government would have said, "No, we want to keep the barren mountain tops, rocky hill sides and stunted forest growths; you may not choose them, for the statute

forbids; you must go to Wisconsin, Minnesota, North Dakota and central Washington, and hunt out unoccupied rich farming lands, and from these lands satisfy those losses." And now I am asked to rule that what it is certain no Senator or Representative would have voted for, is what they all meant by the [526] phrase. Of course it is equally absurd to suppose that the company would have proposed any such thing.

It was known to that Congress, as it is known to us, that with the possible exception of coal and iron the mineral lands would be found west of the Missouri River. It was in that portion of the road that the mineral loss would occur. It was known that the same character of land, the same topography, as existed in the place limits, existed in the indemnity limits opposite them. There was no difference in these respects between place and indemnity lands. Now to my mind it is utterly preposterous to assume that Congress seriously intended that the losses must be lifted out of their natural surroundings and carried eastward to the vast agricultural stretches then, as now, known to lay along the line of the road. Can any one suggest any plausible, or even any possible, reason for such an intention?

I have already called attention to the purpose of the act to open up the country so that the returning soldiers might go there to find homes. Now I am asked to assume, because of the literal phrase, that, in the teeth of that purpose Congress intended to deplete the lands which could serve that purpose

and to keep lands where by no possibility could these men seek habitation. The whole thing so offends my every notion of statutory construction, so offends every possible historical purpose, that I cannot for one moment entertain the thought.

Shank v. Aumiller, in the Western District of Washington, by Judge Neterer (1914) 217 Fed. 969, is an illustration of the interpretation of a statute as using the words "agricultural" and "mineral" in opposition. An act of August 30, 1890, limited the aggregate of entries by any one person upon the public lands [527] to 320 acres. The following year Congress, in effect, added a proviso that the act should be construed as pertaining only to agricultural lands, and not to mineral lands. Shenk had theretofore acquired 320 acres under the desert land law, and sought to file on additional land. The court held that the words "agricultural lands" were used only in contradistinction to mineral lands.

As pointed out by the company, the 5,120 acres involved in the Forest Reserve case were selections in what is now the Gallatin National Forest, on mineral losses. The government's testimony shows that not one acre of the Gallatin National Forest is agricultural within its definition. Hence, though the selections in the Forest Reserve case involved the identical question now presented, it was not raised. Nevertheless, Mr. Justice Van Devanter, in writing the opinion, made a statement which, in the light of the present contention of the government, is startling. In stating the terms of the grant he said (256 U. S. 51, 59):

> "As indemnity for any lands so excepted, as also for any excluded as mineral, other lands were to be 'selected by said company,' under the direction of the Secretary of the Interior, from unoccupied, unappropriated, nonmineral lands in odd-numbered sections within prescribed indemnity limits."

Thus he interpreted the word agricultural, in the very proviso under consideration, and in an identical situation, as meaning nonmineral.

The United States introduces its discussion of the subject with these words:

> "This issue is squarely presented for the first time in this court."

To my mind that itself is almost a conclusive answer to the argument. Without attaching undue importance to the language of Mr. Justice Van Devanter, and treating this issue as one of [528] first impression, yet the question was inherent in every mineral selection made by the Northern Pacific from the inception of these grants down to the present time, as well as in every mineral selection under at least two other grants having identical mineral indemnity provisions, that of July 27, 1866, to the Atlantic & Pacific and the Southern Pacific, and that of March 3, 1871, to the Texas & Pacific. After nearly three-quarters of a century this question is now raised for the first time.

If, in the Forest Reserve case, the Attorney-General's office, the Land Office, the railway com-

pany, or the Court, had considered that the lands then sought to be selected could not be taken on mineral base because non-agricultural, there would have been no necessity to go to any other question. Now I am asked to rule that I should go back to the uniform ruling of the Land Office, back of the Forest Reserve case, and hold that the railway company through guile concealed this question, and that through indolence and overwork, all departments of the government failed to apprehend it.

In what I have said above I have had in mind the several rules of construction stated by Blackstone, but have not attempted to separately apply them. They run in this case, as in most others, into one another. Thus the spirit, purpose, results, the condition of the country, the situation of our people which called for the railroad and the grants, all point to one meaning of the phrase and make absurd to my mind the literal meaning tendered by counsel through dictionary definitions.

I conclude that the mineral indemnity selections listed in N. P. exhibits 144 and 146 may be made in any lands which are non-mineral, non-coal and non-iron. I believe that the testimony [529] is undisputed that the lands in the first and mineral indemnity limits to which these selections are directed are of that character. I am, of course, not attempting now to determine whether they are available for selection as against other objections, presently to be discussed. I further conclude that the substitution selections upon mineral losses proposed by

N. P. exhibit 145 are not to be defeated by want of proof that the lands sought to be supported are agricultural in the literal sense. They were ascertained to be non-mineral when the original selections were made, and that is sufficient. The question as to their non-coal and non-iron character will be considered in the discussion of the substitution issue.

V. Lands in Absaroka and Beartooth Forests. 314,544.05 acres.

These lands lie within the place limits in Montana. They were lost to the grant by reason of the existence of the Crow Indian Reservation, the reservation having been created by treaty of May 7, 1868, and the road not having been definitely located through it until June 27, 1881. Indemnity was had for the loss. Afterward, April 11, 1882, Congress ratified an agreement with the individuals and heads of families of the Crow tribe whereby the Indians agreed to sell certain reservation lands, including those in dispute, to the Government of the United States, it agreeing, in consideration thereof, to pay to the Indians $30,000.00 per year for 25 years in addition to the expense of survey of the remaining lands and certain other sums. While the rule announced by Attorney-General Wickersham in 1912, found in 41 L. D. 571 (see also pp. 574-583) evidently would have authorized the company to select such of the restored land as were surveyed, in satisfaction of mineral [530] losses, it did not attempt to do so, and the United States, by successive withdrawals in the years 1902 to 1909 inclusive, put the

lands in controversy partly in the Absaroka, and partly in the Beartooth, national forests.

The Attorney-General, at the citation just given, advised the Secretary of the Interior that place lands lost to the grant and afterward restored to the public domain were subject to selection for mineral losses, as being, at the time of selection, unoccupied and unappropriated lands within fifty miles of the road, and the Department thereafter administered the grant in accordance with that advice. The government does not appear to contend that the opinion and practice are erroneous. It implies that if the company had got about to select the lands before Congress reappropriated them for the national forests, it could have obtained them as indemnity. The government calls attention to adjoining Crow lands which were restored for disposal to actual settlers only and to which the company abandoned its claims, the point of the distinction being that since the government could restore upon such condition that the company could not select, the company could not complain if a gratuitous unconditional restoration were thereafter revoked.

The company relies upon the opinion of the Attorney-General. It excuses its omission to select the lands by explaining that the withdrawals occurred before the opinion and the consequent practice permitting mineral indemnity selections in place limits. It also says, which I accept as a fact, that the government has patented to the railway as mineral indemnity 60,000 acres of restored Crow lands,

which were not put into reserves. Incidentally the railway has selections pending for 4,390.47 acres of lands in similar situation. [531]

The government has made no question about restored Crow lands and other restorations to the place limits patented to the company. It has not asked for reconveyance nor compensation. I assume that any such patented lands would in any case fall within the rule applied to other lands erroneously patented, and should be charged to the company, the grant being deficient and no lands being tendered in their stead. That rule was conceded as to the lateral and terminal errors and the Greater Sioux lands. The government does not seem to be contending that the company is not entitled to patents upon its pending selections.

The whole question will turn upon what the phrase "and within fifty miles thereof" means. Does it include the forty-mile place limits of the grant, or does it mean only the ten-mile indemnity strip created for other losses so that for mineral losses the company could go to the same strip to which it went for other losses, and not elsewhere? The first thing that strikes one when he comes to consider this question is: What lands within the forty-mile limits could have been taken? By the very terms of the statute they had to be unoccupied, unappropriated, odd-numbered sections; but those very lands passed by the grant, and, therefore, there was nothing left, apparently, from which a selection could be made to satisfy mineral losses. If

these words are held to apply to the forty-mile place limits then it follows of necessity that Congress intended that lands which, for one reason or another were restored to place limits might be selected in satisfaction of mineral losses. Congress doubtless appreciated that it might be many years before mineral losses in place would be known, and that, in the course of those years, many restorations to the place limits would be made—homesteads which had been abandoned, or which for [532] some legal reason the settler had failed to get under his claim; lands reserved and held by the government for some purpose, and restored to the public domain when the purpose had been accomplished; in short, all sorts of restorations to place limits.

I say frankly I should have been inclined to hold that this construction of the provision was rather fanciful, and I should not have been inclined to adopt it, except for the opinion of Mr. Wickersham. I should not be willing to set up my own judgment in opposition to the opinion of so great a lawyer. However, that this construction must be adopted is plain from a consideration of the grant to the Southern Pacific of date July 27, 1866, precisely two years after this grant was made. There the act contains, ipsissimis verbis, the mineral indemnity provision of the Northern Pacific grant, except that in that case it was confined to the place limits, that is, twenty miles on each side of the line of the road. Now, obviously, therefore, Congress intended in 1866, by that language that indemnity might be se-

lected from restored lands, because there were no other lands out of which possibly any selections could have been made. If, therefore, that was the Congressional intention, as it plainly was under the Act of July 27, 1866, there is no difficulty in understanding that the same precise provisions extending ten miles beyond the place limits should receive the same interpretation. I can see no possible answer to this. Of course, when the government reacquired these lands from the Crow Indians, it might have limited them to a special purpose, and held them only for that purpose, in which event I should think they would not fall within the above reasoning; but, as a matter of fact, the lands were restored to the public domain without limitation. They then became a part of the indemnity limits for mineral losses, and sub- [533] ject to selection therefor. I think, too, that the opinion of Mr. Justice Holmes, speaking for the Supreme Court in the case of United States v. Southern Pacific Railroad Company, 223 U. S. 565, declares precisely the foregoing principles. There the lands in dispute were within the indemnity limits of the grant to the Southern Pacific, and within the place limits of the grant to the Atlantic & Pacific by the same act. The Atlantic & Pacific grant was forfeited. Patents were issued to the Southern Pacific on indemnity selections and the United States brought suit to cancel them and for an accounting, arguing that since the lands lay within the place limits of the Atlantic & Pacific they could not have been contemplated as possibly falling

into the indemnity limits of the other road. The Circuit Court and the Circuit Court of Appeals held that the state of the lands at the time of selection determined the right. The Supreme Court affirmed, saying (p. 570):

> "An indemnity grant, like the residuary clause in a will, contemplates the uncertain and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power. Ordinarily no color or title is gained until the power is exercised. When it is exercised in satisfaction of a meritorious claim which the government created upon valuable consideration, and which it must be taken to have intended to satisfy (so far as it may be satisfied within the territorial limits laid down), it seems to us that lands within those limits should not be excluded simply because in a different event they would have been subject to a paramount claim. It seems to us, in short, that Ryan v. Central Pacific Railroad Company, supra, should be taken to establish a general principle and should not be limited to its special facts."

Ryan v. Central Pacific Railroad Company, 99 U. S. 382, had applied the same doctrine to indemnity lands which at the time of the grant were subject to a claim under a Mexican grant. It was [534] held that upon the later extinguishment of that claim, the lands were subject to selection as indemnity for losses in the primary limits of the railroad grant.

Thence it follows that the Absaroka and Beartooth lands became subject to selection when they ceased to be a part of the Crow Indian Reservation, and are as much within the rule of the Forest Reserve case as any other indemnity lands.

VI. Lands formerly in Fort Ellis Military Reservation, 3,300.82 acres.

Fort Ellis was created prior to definite location of the railroad. It lay within the place limits, so that the lands were lost to the grant; and indemnity was had for them. The fort was abandoned in 1886 under the Act of July 5, 1884, 23 Stat. 103, entitled "An act to provide for the disposal of abandoned and useless military reservations," providing for the survey, sale and appraisement of the lands within any military reservation which might become useless for military purposes. Later, by Act of February 13, 1891, 26 Stat. 747, entitled "An act to provide for the disposal of the abandoned Fort Ellis military reservation in Montana, under the homestead law, and for other purposes," Congress granted one section to the State of Montana for a

militia camp-ground and authorized the State to make certain other selections, and further provided:

> "That if any portion of said reservation shall remain unselected by said State for a period of one year after the approval of the survey, that portion remaining unselected shall be subject to entry under the general land and mining laws of the United States."

It is obvious that these restored lands will be governed by the principle applied to the Absaroka and Beartooth lands, unless taken out of that principle by the proviso just quoted. [535]

The government contends that lands which Congress has made "subject to entry under the general land and mining laws" may not be selected under the Northern Pacific granting act, it being a special statute.

The company emphasizes that under the mineral proviso indemnity may be taken from unoccupied and unappropriated odd-numbered sections within fifty miles of the line of the road. It contends that at the date of withdrawal the lands were unoccupied and unappropriated, and interprets the Act of February 13, 1891, as meaning that the lands should be subject to disposal under the laws relating to both non-mineral and mineral land. It states that 80 acres were selected by the company under one of the lieu acts and that 160 acres classified as mineral were selected and patented to the company under the same act. It states that the Secretary caused these

lands to be classified under the mineral classification act, and that in general the Secretary treated the land as part of the unrestricted public domain.

The statute under which the Fort Ellis Reservation was abandoned was evidently not a restoration to such status that the lands might have been selected. It permitted only survey, appraisement and sale. The later statute authorized only "entry" under the general land and mining laws. While the Northern Pacific granting act was a public land law, as well as a contract relating to the public lands, it was not a general land law, but a special one. "Entry" is a technical word relating to the procedure whereby persons may initiate rights to lands within the public domain. It does not comprehend the other technical term "selection". Having regard to the fundamental rule that the grant must be strictly construed in favor of the sovereign, I must hold, [536] notwithstanding such practice as the Land Office may have followed with respect to them, that the Fort Ellis lands are not subject to selection.

VII. Lands in Northern Cheyenne Indian Reservation, 52,052.93 acres.

Unlike the lands under the last two headings, these are not lands restored to place limits. They lie in first and second indemnity limits. After definite location of the road they were placed, by executive orders, in the Indian Reservation. The action of the government in thus undertaking to deplete the in-

demnity limits raises the same question as that pertaining to withdrawals for national forests and other governmental purposes, and will be discussed as part of the general discussion of that subject, unless removed from it by the special points now made by the government.

Until 1926 all of the lands within the reservation including those lying within the company's indemnity limits were kept in tribal status. In that year Congress declared the reservation to be the property of the Indians, and authorized the Secretary of the Interior to prepare a roll of the Northern Cheyenne Indians then living and to allot in severalty lands classified as agricultural and grazing to the enrolled Indians in tracts not exceeding 160 acres. 1547 allotments were made in 1932.

The government contends that no compensation should be awarded to the company for these lands, because, first, an Indian reservation is not a "Government reservation" within the meaning of the act of June 25, 1929, under which this suit is brought, providing that indemnity lands within the boundaries of any national forest or other government reservations are taken out of the operation of the grant and retained by the United States, and that the company [537] have compensation therefor; and, second, there is no evidence that the lands are unappropriated and unoccupied. The company, on the other hand, maintains, first, that the Indian tribes are wards of the government; that an Indian Reservation is a public use; that the government re-

tains the power of disposal; and that such a withdrawal is within the meaning of the 1929 statute; and, second, that the lands were unoccupied and unappropriated at the time they were withdrawn and set apart for reservation purposes.

I am not inclined to give the term "Government reservation" in the 1929 act, a limited meaning. As I have heretofore said, it is the evident purpose of that act to determine all controversies and have a full accounting. It would be very unfortunate if by reason of some narrowness of expression or interpretation all other questions should be settled, and the question of compensation for all other lands determined, except the railway's claim to this particular area.

I do not believe, however, that the expression requires any construction. The Indians are the wards of the government. In providing for them the United States is exercising its sovereign authority, and hence a reservation for Indians is as much a government reservation as is one for military purposes, and is clearly within the subsequent phrase of the statute, "governmental purposes."

Counsel show that a considerable portion of the reservation lands had been allotted to individual Indians. There is no proof, however, that any of the allotments was of any portion of the specific lands in controversy, nor is it shown that the allotted tracts have been patented or that they are free from ultimate disposition by the government. I think, however, that, [538] even if those things were

shown, yet the reservation in which the allotments occurred would still be a government reservation, because it would be under the police and control of the government. As an analogy, moneys, individual and tribal, owed the Superintendent of an Indian reservation, constitutes a debt due the United States. Bramwell v. United States Fidelity & Guaranty Company, 269 U. S. 483.

Finally, I do not think that the condition at this time governs either as to whether the reservation was governmental within the 1929 act or as to whether the lands are to be considered as unoccupied and unappropriated. Rather, their status when withdrawn governs. If the company is entitled to select the lands now and to have compensation for them, it is because they were taken out of the indemnity limits and appropriated by the United States, at a time when the railway had a right to look to them for indemnity. That it afterward conveyed the lands away, or peopled them with Indians, or did anything else with them that the company could not prevent, should not improve its position nor weaken that of the company, any more than the rights of the railway to compensation for lands in the forest reserves should be held to be defeated by any action of the government in permitting homestead entries therein, or in making any other disposal of the lands which it has withdrawn for its purposes. The lands were all unsurveyed at the time of their withdrawal, so that the company could not have selected them. The fact that the government

withdrew them negatives the idea that they were occupied or appropriated under some other claim.

I conclude that the Northern Cheyenne lands fall in for consideration with the other withdrawn lands.

[539]

The net result of my rulings upon the Absaroka and Beartooth, Fort Ellis, and Northern Cheyenne lands is to remove from possible selection by the railway company, in satisfaction of its unused losses, only the 3,300.82 acres of Fort Ellis lands. As will hereafter appear, other lands remaining in the forest reserves exceed the ascertained deficiency, so that so far as quantity alone is concerned, the withholding of the Fort Ellis lands has no practical effect.

VIII. Substitution of Losses.

N. P. exhibit 138, revised, discloses the company's proposal for substitution of base or re-arrangement of losses. Having selected indemnity on certain specific losses, it asks that it be permitted to assign other losses to support these selections and to have back for use elsewhere the losses originally assigned. The several items involved are as follows:

Having used 786.98 acres of Minnesota subsequent losses in first indemnity limits it asks leave to substitute prior and mineral losses in order that it may have the subsequent losses to use in Minnesota second indemnity limits. The second item is the reverse; it is a proposed substitution of 1,019.36 acres of subsequent losses to make good an assumed error

in the selection of lands in second indemnity limits on prior losses. I have held that prior losses may be used in second indemnity to the extent of and subject to the conditions stated in the resolution, and hence these two items of substitution are unnecessary and need not be further examined.

The next three entries represent rearrangements on account of correction of lateral limits in Montana and Idaho. Re- [640] drawing the limits threw some lands formerly in first indemnity limits into second; hence it was assumed that subsequent losses should be assigned in lieu of prior and mineral losses originally used. But, as I have said, I do not consider any substitution necessary, though care should be observed lest lands in second indemnity be taken beyond the quantity of subsequent losses. The company claimed credit for "taking the bitter with the sweet" in thus offering to give up some of its meager stock of subsequent losses in exchange for mineral losses, of which it has an abundance. Plaintiff insisted that the defendant was endeavoring to get credit which it did not deserve, because by succeeding items it again furnished mineral losses in an amount sufficient to get back the subsequent losses just given up; and plaintiff called this process "re-substitution". It is evident that the company was proposing only to supply, in the aggregate, enough mineral losses to release the desired measure of subsequent losses, including those offered upon the lateral corrections. I find nothing about it either to praise or to blame.

The next two items, 602,810.73 and 194,617.32 acres, are the significant ones. They represent the company's proposal to supply Montana and Idaho prior and mineral losses in lieu of subsequent losses formerly used in first indemnity limits. Prior and mineral are classed together, but the great preponderance is mineral.

The reason for the proposal to make the substitution or rearrangement is as follows: there are large quantities of second indemnity lands in Montana and Idaho which cannot be taken on mineral base because they are beyond the fifty mile limit. The company has relatively small quantities of unused general losses, but has, as said above, an abundance of unused mineral losses. Many years ago it used quantities of subsequent losses in first indemnity limits [641] all along the line, where it might have used, or might now use, mineral losses. Hence it asks leave to substitute by putting its mineral losses there now, and having back its subsequent losses to use out in the sixty mile belt.

The remaining three items represent other occasions for substitution. The purpose of the first is to put mineral losses instead of subsequent losses in a situation where land was withdrawn for a military reservation after the date of the grant and before definite location, the loss being treated as a subsequent loss, and where later that land was ascertained to be mineral, constituting it a mineral loss, the company wishing return of its subsequent losses on its substituting mineral. The last two items

represent the supplying of prior or mineral losses in lieu of losses suffered under the grant of 1870 and mistakenly used to select lands in the grant of 1864. The government has indicated no objection to these incidental substitutions.

The discussion will therefore pertain to the proposed use of mineral losses to release subsequent losses, represented by the two large items mentioned above. The request is a most important one, for unless it be allowed the company will have left about 800,000 acres of unused and unusable mineral base, and will, to that extent, not be able, all other questions aside, to satisfy the deficiency in its grant.

On occasion the Land Office has permitted rearrangement of losses, as where the selection list was still pending, or where it had itself induced an error. Its attitude is indicated by two decisions:

In Northern Pacific Ry. Co. (March 26, 1908) 36 L. D. 328 the company had offered prior losses for selection of second indem- [642] nity lands, and the selections had been held for cancellation. On motion for review the company claimed either that the selections should be granted on the prior losses or that it should be permitted to substitute subsequent base formerly used in first indemnity limits, supplying prior losses in lieu of the base so taken. First Assistant Secretary Pierce held that the resolution of 1870 excluded the use of prior losses in the selection of lands in the second indemnity belt, but said (p. 331):

"There is, however, merit in the argument that the company having used losses in support of selections in first indemnity limits, which if free might be used in support of selections in second indemnity limits, and there being other unsatisfied losses available for first indemnity selections, the Department should release those bases formerly used upon the substitution of other unsatisfied bases and permit the released bases to be used in support of the second indemnity selections here in question. This will be done subject to the limitations suggested in your office letter of September 5, 1907, above quoted (suggesting that protection be afforded to intervening homesteaders and timber and stone entrants.) All rights initiated upon these lands under any of the public land laws at a time when they were freed from the pending selections and subject to appropriation, will be protected, but otherwise the company will be permitted to proffer substitute bases for the consideration of your office."

Later, in Northern Pacific Ry. Co., (July 27, 1915) 44 L. D. 218, the company applied to substitute certain mineral losses for a like quantity of first indemnity lands. The sequence of events was as follows: for certain North Dakota first indemnity selections the company designated as base a list of place losses between Superior and Ashland, Wisconsin, within the Portage conflict. The Department

held (Nov. 13, 1895) that the grant did not extend east of Duluth, and gave the company 60 days within which to designate new base. The company designated second indemnity lands in the Crow Indian Reservation, Montana, and upon that base the North Dakota indemnity selections were patented. [643] Subsequently, the Supreme Court held that the company's grant extended east to Ashland. The company thereupon requested that the Wisconsin base be reinstated and the Crow base released, upon the ground that the grant in Montana was deficient and that the Wisconsin losses did not afford valid base for second indemnity selections in Montana, while the Crow losses did. This request was granted "in order that the company might not be prejudiced" by the Department's decision of Nov. 13, 1895, which the Supreme Court had held to be erroneous. The company then asked to further substitute mineral base for the Wisconsin base, because, in part, the latter could be used for coal and iron lands, while the mineral losses could not. In support of this further request the company cited 36 L. D. 328. First Assistant Secretary Jones, denying the request, said (p. 219):

> "It will be observed, however, that in that case the selection was unpatented and the proffered substitute bases were of similar character to the original bases. In the case here under consideration, the list has been patented without inquiry as to the coal or iron character of the lands, and if the mineral bases were allowed to

be substituted, as now requested, it would be necessary to have an examination made to determine whether the selected tracts contain coal or iron. This would virtually mean the reopening of a case where the selected tracts were correctly patented years ago and an examination by the Government of lands which have passed beyond the jurisdiction and control of the land department. Manifestly such an examination is unwarranted and cannot be authorized."

It is clear from the foregoing that the Secretary of the Interior regarded the substitution of base as something to be allowed or rejected in the course of due administration of the grant. For such reasons as appealed to him as sufficient, he permitted substitution. In other cases, for like reasons, he denied it. There was no question in the Land Department, at any time, of its authority in administering the grant, to permit or to deny substitution [644] in the interest of justice. I think this view of the Secretary's powers is correct. As the submission of base was a mere matter of orderly administration, I can see no reason why the regulations prescribed by the Secretary might not be altered or bent to suit the situation, and to do justice between the United States and the company. When the evidence on this subject was offered, I expressed the view that the authority of this court did not extend to administrative methods, but that the grant came here under the act of 1929, as it stood at that date, and that the

review of the previous administration of the grant was limited to the correction of errors in law or fact. I now think that I was partially in error in the impression I then had. Were the grant now committed to the Secretary for adjustment, as it had been before the act of 1929, I am quite clear that his power to revise all administrative steps, for good reason, could not be doubted. I think that it would be his duty to adjust the grant so as to do justice between the parties, and, if necessary, to permit substitution of base, or any sort of reassignment of losses and selections of indemnity, that would conduce to that end. Of course, he should act with sound administrative discretion, not arbitrarily nor capriciously, but on reasons which appealed to his administrative judgment as sufficient. I am now of the opinion, therefore, that such adjustment of the grant is committed to this court, with the same power and authority possessed by the Secretary under the previous statute directing him to adjust. The only difference is that the secretary should have acted, and doubtless would have acted, with a sound administrative discretion, while the court can act, and should act, only in accordance with sound judicial discretion, meaning, of course, a discretion in the application of established [645] practices and principles of equity. With that single difference, I think that this court is invested with authority to so adjust this grant as to do equity between the United States and the company, and that, wherever, for the purpose, reassignment of base is necessary, this court

may allow it if no equitable principles stand in the way. What I mean to say is that so far as concerns the subject per se, this court now has authority to deal with it judicially as fully and completely as, under previous statutes, the Secretary was authorized to deal with it administratively. The only question, therefore, remaining is whether or not this court should, in the exercise of sound judicial discretion, and in accordance with recognized principles of equity, allow or refuse the request.

Now primarily, and at the base of this discussion, lies this broad principle of equity, that the United States is presumed to intend to gratify its grant to the company, if it may do so. The applicable maxim is, "Equity imputes an intention to fulfill an obligation", and its general purport is stated by Mr. Pomeroy in Pomeroy's Equity, Sec. 420 (3rd Ed.):

> "This principle is the statement of a general presumption upon which a court of equity acts. It means that wherever a duty rests upon an individual, in the absence of all evidence to the contrary, it shall be presumed that he intended to do right, rather than wrong; to act conscientiously, rather than with bad faith; to perform his duty rather than to violate it."

Primarily, the foundation equity in this case is that the grant ought to be satisfied if it can be done without violence to established principles, or without injustice to the United States, so that if there were no reasons for allowing or refusing the substitution,

other than those inhering in the application itself, I should think it ought to be allowed, for in no [646] other way can the government fulfill its obligation.

Next applies the maxim, "He who seeks equity must do equity." Substitution may be required under that principle without further refinement. Looking at the question at large as it now stands, it is within the sound judicial discretion of this court to permit this change upon the broad general principle that the court will require the plaintiff to do equity. No wrong is done to anyone; the United States is not disadvantaged in anywise except in having to carry out its agreement with the company; and as this is a final adjustment of the grant and as the Secretary, if he were adjusting, might within his administrative discretion permit the substitution, so this court, within its judicial discretion and in conformity with the principles of equity, might, and under all the circumstances of the case I hold should, permit it.

If, however, a specific head of equity be required to support the substitution, it may be found. Here, in brief, is the case:

When the Act of 1864 was passed the Statutes at Large were printed by Little & Brown under a contract with the United States, and not by the Government Printing Office, as now. However, each volume contained a reference to the act of Congress reciting that the edition had been "CAREFULLY COLLATED AND COMPARED WITH THE ORIGINAL ROLLS IN THE ARCHIVES OF THE

GOVERNMENT under the inspection and supervision of the ATTORNEY-GENERAL OF THE UNITED STATES, as duly certified by that officer", and that the laws so published should be competent evidence of the several public and private acts of Congress in the courts and in all the tribunals and public offices of the United States without [647] further proof or authentication. The grant of 1864 appears in 13 Stat. 365. There the mineral indemnity provision reads as follows:

> "That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided:"

The words "and within fifty miles thereof" are omitted.

For something over forty years all concerned understood the published statute to be as enacted and enrolled.

In 1904 the company filed a selection list in the Helena Land Office for some 3,000 acres of land in the second indemnity belt, assigning as base a corresponding area of mineral losses. The Commissioner of the General Land Office referred the list to the Secretary of the Interior for advice. While the matter was pending, the company's land attorney, Mr. Mason, in reading the debates in Congress, inferred that the act might have been incor-

rectly printed. He asked the company's attorneys in Washington to consult the enrolled bill, and thus the error was disclosed. The Secretary of the Interior was notified, and the company substituted general losses in support of its selections. The error in quoting the statute occurs both in the statement of the case and in the opinion of the court in Barden v. Northern Pacific Railroad Company, 154 U. S. 288, decided in 1894. Even after the error was discovered and communicated to the Commissioner, the officers of the Department of the Interior continued to quote the act as published. Assistant Secretary Ryan did so August 30, 1905, in 34 L. D. 105, and Secretary Ballinger October 24, 1910, in 39 L. D. 314. As late as December 12, 1911, in 41 L. D. [648] 576, Assistant Attorney-General Cobb referred to the discovery as "recent", saying:

> "The words underscored 'AND WITHIN FIFTY MILES THEREOF,' do not appear in the law as published in the Statutes at Large, recent discovery of the omission being responsible for one of the questions in the present controversy, * * *."

Attorney-General Wickersham's reference to the error, in 41 L. D. 572, follows. Not until then does the mistake appear to have been fully apprehended by the officers charged with the administration of the grant.

It is true that Mr. Schwarm testified that in the very early days the company had a correct copy of the statute, as enacted, in its possession. At that

time, however, the question could not have come up, or been of any importance, because then, and for long after, there were no ascertained mineral losses; and, as the years went by, those having to do with the grant left the employ of the company, and are all now dead. So through all the time with which we are here concerned it is apparent, without dispute, that both the railroad and the Land Office and the Attorney-General's office, indeed the courts of the United States, regarded the statute as correctly printed, and all were unconscious of the error. In the very nature of things, no one desiring to consult the statute would have dug up from the file a loose copy; but naturally, and I might almost say of necessity, the officials of the railway would, as did the court and the men in the Land Office, pick up the volume of the Statutes at Large and look at the act as there printed.

In my own office, for years, we have received copies of the various statutes as passed by the legislatures. They are looked through first to see whether there are any emergency meas- [649] ures, and to get a cursory view of the laws with which we must conform when they go into effect. They are loosely filed in some appropriate place in the office, and when the publishd volumes are printed and received, no further reference is made to those loose leaves. There is neither necessity nor reason for it. It would be a most preposterous idea that, because in one of the loose leaf advance sheets the statute was correctly printed and showed the terms of the

law as passed, and in the published volume some word or phrase was left out, we should be charged with notice of the error. I should say that such an idea would never be put forward except in the exigencies of a lawsuit. Of course, what form the copy Mr. Swarm refers to was in, where it was kept, what, if any, use was made of it at the time, is not disclosed by the evidence and after all the years could not possibly be shown; but it appears to me so plain that, after the printed volume was received, everyone desiring to consult the statute disregarded, and in time came to forget, the copy, and to rely upon the printed text, and it only, that I think there is no room for even a doubt upon the subject.

The fact of this mistake being undisputed, a second question is whether it may be said upon this record that it influenced the company in making its original assignments of losses and selections of indemnity. In the nature of things, of course, no direct evidence can be had, as there is no person living who could know the fact; but I should say that the influence may be fairly and reasonably inferred. Men act in accordance with their interests, upon the facts as they understand them. The company used up its general losses within first indemnity; it did not assign its mineral losses. Now it is obvious that had the land depart- [650] ment of the railway understood that it could use its mineral losses only in first indemnity limits, while second indemnity limits were open to its general losses,

it would not have exhausted first indemnity, leaving itself nowhere to satisfy its mineral losses, present or prospective. It is a plain inference from the facts, it seems to me, that mineral losses were reserved to be assigned upon the theory that they might be used anywhere nearest the line of the road. I have no difficulty whatever in saying that it sufficiently appears from the testimony that the company did act to its prejudice in reliance upon the statute as printed, and that had the statute been correctly printed, or had the company's officers then known of the mistake, it would have acted differently. So we have then here a mutual mistake on the part of the officers of the land department of the United States, and the land department of the Northern Pacific as to the statute, and as to the consequent rights of the company and the United States under that statute, and a course of action to the detriment of the company.

The first objection is that this was a mistake of law. Obviously, for several reasons, the objection is not sound. In the first place, within the meaning of that phrase, the statute making this grant to the Northern Pacific is not a law. It is a private statute, and the error occurs in the granting section of that statute. It is true that these railroad granting acts are laws as well as grants, but they are laws only in the sense that they express the will of Congress and that the railroad company is bound by that will, and, when it accepts the grant, it accepts it as the Congress of the United States in-

tended. in no other sense is it a law. But even if by a stretch of speech it [651] could be called a law within the meaning of the doctrine that equity will not relieve against mutual mistakes of law, the result would not be at all altered.

The principle is thus declared in Pomeroy's Equity, Sec. 849 (3rd Ed.):

> "Sec. 849. RELIEF WHERE A PARTY IS MISTAKEN AS TO HIS OWN EXISTING LEGAL RIGHTS, INTERESTS, OR RELATIONS. Is it possible to formulate any general rule which shall be a criterion for all cases of relief from mistakes of law pure and simple, and without other incidental circumstances, which shall be sustained by judicial authority, and which shall furnish a PRINCIPLE as guide for future decisions? In my opinion, it is possible. It has been shown that where the general law of the land—the common JUS—is involved, a pure and simple mistake in any kind of transaction cannot be relieved. Also, where a person correctly apprehends his own legal rights, interests, and relations, a simple mistake as to the legal effect of a transaction into which he enters, in the absence of other determining incidents, is not ground for relief. There is, as shown in a former paragraph (Sec. 841), a third condition. A person may be ignorant or mistaken as to his own antecedent existing legal rights, interests, duties, liabilities, or other relations, while

he accurately understands the legal scope of a transaction into which he enters, and its legal effect upon his rights and liabilities. It will be found that the great majority, if not indeed all, of the well-considered decisions in which relief has been extended to mistakes pure and simple fall within this class; and also, that whenever cases of this kind have arisen, RELIEF HAS ALMOST ALWAYS BEEN GRANTED, although not always on this ground. Courts have felt the imperative demands of justice, and have aided the mistaken parties, although they have often assigned as the reason for doing so some inequitable conduct of the other party which they have inferred or assumed. The REAL REASON for this judicial tendency is obvious, although it has not always been assigned. A private legal right, title, estate, interest, duty or liability is always A VERY COMPLEX CONCEPTION. It necessarily depends so much upon conditions of fact, that it is difficult, if not impossible, to form a distinct notion of a private legal right, interest, or liability, separated from the facts in which it is involved and upon which it depends. Mistakes, therefore, of a person with respect to his own private legal rights and liabilities may be properly regarded,—as in great measure they really are,—and may be dealt with as mistakes of fact. Courts have constantly felt and acted upon this view, though not always avow-

edly. Lord Westbury openly declares that such misconceptions are truly mistakes of fact. Some very instructive remarks of Sir George Jessel, which I have placed [652] in the foot-note, will, with a slight modification of his language, apply to all instances involving this kind of error or ignorance. A general rule permitting the jurisdiction of equity to relieve from mistakes of the law pure and simple, in all cases belonging to this species, and confining its operation to them, would at once reduce to clearness, order, and certainty a subject which has hitherto been confessedly uncertain and confused. It would work justice, for these kinds of errors stand upon a different footing from all others, and justice and good conscience demand their relief; it would conform to sound principle, for these mistakes are in part essentially errors of fact; and finally, it would explain and harmonize many decisions of the ablest courts which have hitherto seemed almost inexplicable except by violent and unnatural assumptions. I therefore venture to formulate the following general rule as being eminently just and based on principle, and furnishing a simple criterion defining the extent of the jurisdiction. The number of decisions which support it, and which it explains, is very great. Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities,

> or other relation, either of property or contract or personal STATUS, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact. It should be carefully observed that this rule has no application to cases of compromise, where doubts have arisen as to the rights of parties, and they have intentionally entered into an arrangement for the purpose of compromising and settling those doubts. Such compromises, whether involving mistakes of law or of fact, are governed by special considerations."

It is too plain for discussion that the mistake we are here considering comes flatly within the rule stated by Mr. Pomeroy. I shall not trouble the court with reference to cases at large. Mr. Pomeroy discusses the whole subject, commencing at Section 841, with footnotes and illustrative cases, and points out the limits of the doctrine one way and the other.

The next objection is that the company is charged with knowledge of its grant, and hence of the mistake. Obviously, [653] however, that cannot be so. If A and B enter into a contract, the terms of

which are all agreed upon, and it is turned over to a stenographer to be typewritten, and, through error and oversight of the stenographer, a material term of the agreement is omitted, and it is not noticed by the parties until years afterward, it would be subversive of all sense of equity and justice that both parties were bound to know what the stenographer had not written. The truth is that it would be a mistake of fact pure and simple, a mistake of the stenographer. So, likewise, it is elementary if the parties enter into a complete agreement, the terms of which they fully understand, and then turn it over to counsel to prepare an instrument to carry out those terms, and counsel, through error or oversight, or even through ignorance of the law, prepares an instrument which does not carry out the agreed terms, the mistake is not one of law by the parties, but one of fact by their counsel. But all this seems to me to be entirely apart from anything necessary to consider. Here was a statute of the United States. Here was a printed volume containing what purported to be that statute as enacted. The courts, the departments of the government, and all private persons were directed by Congress to rely upon that statute as there printed. Both the Department of the Interior and the railway company did rely upon it. Obviously this is so, indisputably so. To call it, under any circumstances, by any circumlocution of words, or refinement of reasoning, anything except a pure mistake of the printer upon which the parties relied, and

upon which they had a right to rely, is to overlook the essential nature of the error. What court, what private individual, what person having occasion to know the terms of a statute, whether it was a public statute or a private statute, would have ever thought of going [654] beyond the terms of the printed volume and examining the enrolled bill in the office of the Secretary of State? It seems to me that the question just put disposes of the whole subject.

Of course the ideal man would not make mistakes, the ideal printer would not misprint a statute; the ideal stenographer would not mistranscribe stenographic notes. The ideal man of affairs, whether of business or a profession, would be guilty of no oversights, no omissions. By that line of thought there would be no occasion for the equity head of relief from mistakes. The doctrine of relief from mistakes is predicated upon the frailty of human faculties. As applied here a common-sense view must be taken. The heads of departments, the whole clerical force of the General Land Office of the government, and the land department of a railroad having forty million acres of land under its supervision all proceeded ordinarily and naturally as men would in their own individual affairs, and so proceeding they accepted the statute as printed, without investigation and without further thought, which they had a perfect right to do.

It is insisted, however, that the company had means of knowledge. In the first place, as said above, it once had a copy. In the next place, it is

inferred, if not said, that it might have gone to the Secretary of State's office and examined the enrolled bill. Well, for that matter, so might the government. The government had precisely the same means of knowledge that the company had, no more, no less. The mistake was the mistake of an agent employed by the United States, and it seems to me it would be the grossest inequity to say that that mistake cannot be corrected because the company might have found out that the mistake had been made. [655]

It is insisted too, that the defendant has been guilty of laches in that it did not seek earlier relief after the error was discovered. It is difficult for me to see what it could have done other than what it did do. In 1910 it made application to substitute mineral losses for Bismarck lists 54 and 56, involving 11,360 acres and 9,880 acres respectively. Apparently at or about the time these applications were filed, a similar application had been made upon Fargo list 14, for 23,467.88 acres, as action upon the Bismarck lists was deferred pending decision upon the Fargo list. That decision is the one reported in 44 L. D. 218, cited above, denying the substitution. The subject evidently remained under advisement in the Department for five years. Some of the mineral base then offered and rejected is being offered now in the defendant's request for substitution. Having tried and failed, I do not see what more the company could have done. I can think of no form of legal action that might have

been invoked to give to the company any relief from the predicament in which it found itself from this printed error. It is too plain to discuss that it could not have sued the Secretary of the Interior, as that would have been equivalent to suing the United States. It is equally plain that mandamus would not lie against him, for he might refuse that which was within his discretionary power; but, anyway, and all that aside, when this court comes to the adjustment of this grant according to principles of law and equity to do justice, it is bound to give the relief suggested by this readjustment. Counsel in argument several times use the word relief. Well enough, if properly understood. This is not a bill or cross bill calling for relief in equity within the sense in which that phrase is generally used. It is simply a correction of errors resulting under the circumstances already stated, and that is all there is to it. [656]

In any event the act of June 25, 1929, directs this court to review the administration of the Northern Pacific grants from the beginning, requiring it to correct any errors. Now to say that the review cannot be had because of lapse of time is to argue that the statute should not be obeyed. I do not think this depends upon whether the railway applied for relief in apt time or not. By the terms of the act under which this suit is brought, so far as concerns this branch of the case, the adjudication is to be made in accordance with equity, disregarding errors in administration. I do

not think you can pare off a little here and a little there by saying that the railway might have done this, that, or the other. I say again that a common-sense view must be taken. The officials of the government could not change the statute to the government's disadvantage by their acquiescence or by a misunderstanding of its terms. Neither should the railway's rights be prejudiced by any error of its officials. The terms of the statute were fixed by Congress. Therefore, it can make no difference as far as the rights of the government are concerned how many years the grant had been administered under this error. It can make no difference so far as the government is concerned how promptly the company acted after the error was discovered. Aside from the general principle that the rights of the United States can be affected only by act of Congress, the 1929 statute expressly directs this court to review the action of any and every official, and, whenever they were wrong, from misapprehension of the law or misunderstanding of the facts, to correct the error and make it right. Now obviously this correction cannot be one-sided. If the officers of the government have misadministered the grant at some point and it may be corrected in the plaintiff's interest, then the joint action of these same offi- [657] cers and the officers of the railway, induced by such misapprehension as the mistake under discussion, should likewise be corrected and adjusted to preserve the mutual rights of the parties.

I think it is preposterous to say that the moment Mr. Mason communicated to the Commissioner the mistake in printing the statute, thereupon the railway was forced to jump in and under whip and spur precipitate a reopening of the whole subject. I think it had a right to rely upon the spirit of fairness and justice, and to expect that the Department of the Interior would recognize what had been done under that error and would co-operate in correcting it. But, all that aside, I am convinced that the letter and spirit of the statute of 1929 direct this court to adjust this grant in accordance with the steadfast doctrines of the common law and the flexible principles of equity, and that the ultimate purpose shall be to do justice; and it is little short of a travesty upon that statute to declare that justice cannot be done in this particular instance because, as is supposed, the company did not act promptly.

The reason assigned by the Secretary for refusing in such case to permit the substitution is urged upon my attention as having weight: that the lands had passed beyond the control of his Department, and an examination would be required to determine whether they were coal or iron. Now it may be that this reason was valid enough for the Secretary in the course of the day-to-day administration of the grant, but it is to my mind perfectly plain that it has no validity here. Either the land is coal or iron or it is not. It is a fact which the government of the United States knows from its own records, or can easily ascertain.

It is said that there has been an adjudication by the Department, and that such adjudication is binding and valid until set [658] aside. I have endeavored to follow the reasoning of counsel upon this question, but without success. I do not see anything that has been adjudged, except that there had been certain losses and that the lands that were selected were all open for selection and that the selection was allowed. Nothing in this proposed reassignment of losses anywhere conflicts with that allowance, with what was ruled, that I am able to see. It is conceded that there are mineral losses. It is conceded that the company has received the lands on indemnity selections. By the proposed reassignment nothing is to be determined. Everything is known. Everything is admitted. There has been a loss and the railway has the land. It proposes to keep the land, but to assign different losses for it.

It is also urged that the truth of the whole matter is that the company supposed it would not have a great number of mineral losses, that it was only through the mineral classification that it discovered the tremendous acreage of those losses, and that this really accounts for the manner in which it assigned losses and made indemnity selections. I fail to see how that enters into the question at all. Whether the company thought it would have many or few, obviously it intended to reserve the mineral losses, whatever they were, to be used anywhere it saw fit nearest the line of the road, supposing there was no limit of distance. Obviously, too, it would not

have done that except for the error in printing the statute.

The United States claims that the company had a choice between using its subsequent losses in first indemnity or leaving the first indemnity limits exposed to settlers until its mineral losses should be established, and that it is bound as by an election. No election is binding unless the facts are known or ought to have [659] been known to the party electing. If the election was made in ignorance of material facts, then it ceases to be binding. This is too fundamental to require discussion. If, as I have held, it is established here that the company elected to use its general losses in first indemnity limits because it supposed by reason of the printed statute it might use its mineral losses beyond first indemnity, assuredly the election was made in ignorance of the controlling fact that it could not so use them, and it follows as a consequence that the elestion was not binding. Certainly if the company made its election wholly independent of whether the mineral losses might be satisfied beyond the fifty-mile limit, the error in the statute could not enter into the question; but, I repeat, it seems to me plain that it must have made its election upon the statute as printed and in ignorance of the restriction now said to control.

When the last map of definite location in Montana was filed in 1883, the general losses exceeded the vacant land in first indemnity limits. It was therefore certain at that time that second indemnity

limits would be necessary. The company made no effort to have them laid down or to have the land surveyed so that it could make selections there for its losses, but, instead, satisfied them, including subsequent, in first indemnity. As said in the discussion of the agricultural issue, there was no evidence nor intimation that the land in the first indemnity belt was more valuable than that in the second. The company may have thought that its mineral losses would be so small that there would be enough land left in first indemnity to satisfy them when they were established, but, on the other hand, its course was consistent with a belief that when the time came the mineral losses could be satisfied "nearest the line of the road" without further territorial restriction. [660]

The company was contending that only lands known to be mineral were excluded from the grant, whereas the United States was contending that all mineral lands, whenever ascertained to be such, were excluded. That was the issue in the Barden case, to which I have referred. It came up in the Circuit Court for the District of Montana in 1891. The Supreme Court finally held, in 1894, after the case was twice argued, that lands ascertained to be mineral at any time before issuance of patent to the company were lost to the grant, thus greatly increasing the probable mineral losses over what the railway had been contending. During those years the company was certainly put upon notice that its mineral losses might be considerable. It was follow-

ing a suggestion in that case that Congress directed mineral classification of all the lands in the place and indemnity limits. The statute directing it was passed January 25, 1895, and the classification began that year. Yet in that year the company used 800,000 acres of Montana subsequent losses in first indemnity. It used 44,000 the following year. There is no evidence that the first indemnity limits were being settled up so fast that the company had to rush its subsequent losses in there to get ahead of settlers; no evidence that it could not at that very time, have applied mineral losses instead. Its action is just as consistent with an assumption that it made no difference which it used, as with the theory that it was consciously being put to an election and "played the indemnity limits" in the way that seemed most advantageous, as suggested in the government's brief. There was an admitted mistake touching the very conduct in question. On the evidence one cannot say that a course of action which might have been induced by the mistake and which might, and actually did, work a disadvantage [661] unless it be corrected, would have been pursued anyway. It seems to me that the error was so vital, the consequences so large, that it ought not to take overwhelming evidence, nor indeed very strong evidence, to justify a ruling that action which would naturally follow the error was the result of it. Of course if the testimony showed the action to have been for some other reason, the court should so regard it, but I do not think the court ought to speculate some other reason.

Aside from all this, however, I do not think the common law doctrine of election has application to selections made as indemnity for place losses. First, the company did not have an unqualified and an unhampered choice in its selections. Lists were required to be submitted to the Secretary. They might be allowed or disallowed, either in whole or in part, not, of course, capriciously, but discretionally, for reasons which seemed to him to justify his action. An essential element of election is that it "may be asserted at the will of the chooser alone * * * In all such cases the characteristic fact is that one party has a choice independent of the assent of anyone else." Mr. Justice Holmes in Bierce v. Hutchins, 205 U. S. 340, 346.

Next, the process of selecting indemnity lands for place losses was necessarily a recurring action throughout the years. The subject was complicated. For certain losses certain sorts of land might be selected, for other losses other sorts. For some losses the railway might go into one territorial limit to select indemnity; for certain other losses it was confined to another area. The quantity of mineral losses could not be apprehended at the beginning of the administration of the grant; it was not until 1895 that the mineral classification began, and it [662] was not until its completion some ten years later that the aggregate of those losses could be ascertained. The condition of lands both in place and in indemnity limits was constantly shifting. The grant has been under administration nearly three quarters of a century. Complications have arisen, such as the restora-

tion of lands to place limits, the enactment of several so-called lieu statutes, the classification for coal, and the withdrawal, beginning with 1898, of great tracts for forest reserves. Now, to inject into this situation the proposition that whenever the railway company made a selection it had thereby elected irrevocably not only to take those lands, but to take them for those particular losses, and that its election bound it for ever and a day, is to apply the common law doctrine of election in a manner without precedent, and to a condition where obviously it does not fit. But even if this view is wrong, it cannot seriously affect the question. If a court of equity, under the maxim that he who seeks equity must do equity, may require a plaintiff who is the victim of a usurious contract to do justice by paying the debt with lawful interest, in other words, to carry out his contract after the usury has been expunged from it; if it may require a plaintiff, as a condition to granting him relief to waive the statute of limitations, Pomeroy's Equity (3rd Ed.) Sec. 393; there ought to be no trouble in holding that the court may require the government here to waive its claim of election in respect to selected lands and permit an opening up of the subject to do justice. It must be continually borne in mind that the doctrine of election is a common law doctrine, that it often works hardship and injustice, and that it would so operate if applied here to each selection, or to any considerable number of selections, made during [663] the years. One of the very things giving rise

to equity jurisprudence is the hardships and inequities frequently resulting from the application of stern and unbending common-law rules to a given situation. To my mind it is perfectly clear, therefore, that, if the doctrine of election has application here, and if it might be said at common law that the company had elected, and that the election was not made in ignorance of a mistake which prompted it, and but for which it would not have been made; if, in short, the contention of the United States that there was an irrevocable election at law is to be sustained, still it remains most certainly true that in this case, under the principle of requiring the plaintiff to do equity, the election cannot prevail to prevent substitution.

I hold that the error in printing the statute not only amply supports the conclusion that substitution should be permitted as a condition of awarding plaintiff the relief which it asks, but also, of itself, necessitates the allowance of defendant's application.

My conclusions upon this whole subject are, first, that even had there been no mistake in the printing of the statute the general equitable considerations to which I have referred would demand that the rearrangement or substitution be allowed; second, that the admitted mistake in the printed statute, I find as a fact, influenced the company in using up the indemnity lands within the fifty-mile limit from the road for its general losses. Had it not been for this mistake, it is as certain as anything can be that it

would have gone for those losses into second indemnity and reserved first indemnity for its mineral. It is impossible for me to believe that the company would have unnecessarily used [664] up its first indemnity lands if it had known that thereby it would be unable to satisfy its mineral losses. In the third place, I think that the question of laches raised by the government has no application here, and that if it has, there has been no laches within the sound view of that doctrine. The company is not an actor, even, in this action. It is not coming into a court of equity seeking affirmative relief within the meaning of the doctrine of laches. The United States has brought this suit, and one of the purposes of the suit, the purpose now under consideration in this hearing, is to adjust the grant; and there inheres in this very purpose the principle that it shall be correctly and equitably adjusted. Even without application for that relief it would be the duty of the court to grant this reassignment. It is but a link in the whole process of adjustment; in no sense is it an application for affirmative relief as by cross bill. And, finally, I am of the opinion that the common law doctrine of election has no application to the selections made by the company from year to year during the administration of this grant, but that, if it should be held to apply, still the mistake in the statute would relieve it from the fact of that election; and that, in any and every event, moreover, the court, under the maxim of requiring the plaintiff to do equity, will, if necessary, set aside the election and readjust without reference to it.

Other reasons are assigned by Mr. Frost at some length, some of which do not appeal to me and others of which seem of such slight importance that I do not think it necessary to discuss them. So also with some of the objections urged by the government, which I think insufficient to overcome the equitable doctrines already stated, which appear to me to be controlling. [665] I am content to rest my opinion upon what I have written, unless, as claimed, the railway has failed to show that the lands sought to be supported by mineral losses are not valuable for coal and iron, so as to exclude them from the term "agricultural."

It is first insisted this fact must be proven by clear and convincing evidence, and certain authorities are cited. I hold that the burden of proof is upon the company because it is seeking to have this substitution made, and it must show it is entitled to it; and as this element of coal or iron is one of the factors in the problem, it must go forward and offer proof, which must necessarily be of an apparently negative character. I hold, however, that the notion of some of the officials of the Land Office that this evidence has to be clear and convincing is without foundation. The doctrine of the clear and convincing character of evidence has its origin and its application in certain classes of cases, and it extends no further. He who alleges fraud, it is said, must prove it by clear and convincing evidence, because fraud will never be presumed, and because every presumption is against him who asserts it.

So if an executor or an administrator deals with the heir at law, shortly after the heir comes of age, it will be presumed that an undue influence had been exercised; that the youth and inexperience of the heir had been taken advantage of, and therefore, it is said, and properly, that when he sets up title acquired from the heir at this time, he must show by the most convincing evidence, first, that there was no element of undue influence or fraud exerted, and moreover, that the transaction was in every way fair and just to the heir. So of the relation of guardian and ward, and of trustee and cestui que trust. Obviously, all these cases rest not only upon the principle of un- [666] due influence, but upon the further principle that the facts are within the exclusive knowledge of the trustee, the guardian, the executor, the administrator. So, likewise, if one wrongfully obtains possession of another's property and disposes of it in one way or the other, and offers to return what he received for it, the burden is upon him to show by clear and most convincing evidence that he not only got a fair price for it, but also that the negotiations by which he sold it were of such a character that he could not have received any more. The facts of the disposal were within his knowledge. He has no right to call upon the person whose property he has made away with to offer proof. He must prove the whole case and prove it by clear and convincing evidence. In general, it may also be said that in any case in which, in the nature of the transaction, the facts are within the exclusive or substantially exclusive possession of one party, he

must go forward and prove clearly and convincingly what those facts are. Now all this rule as to clear and convincing proof, as used by the courts, means this and this only, that the court must be certain that nothing has been concealed; that the person who has exclusive knowledge, substantially so at least, has made a clean breast of the whole transaction. He must explain to the minutest detail, so far as the nature of the case permits; but when he has done so, he has then carried the burden imposed upon him. Now, how by any possibility these principles can be applied to the proof of the coal or iron character of this land is beyond my comprehension. The company knows no more about it than does the government. It has no greater means of acquiring knowledge than has the government. On the contrary, I should say the government, by its geological survey, and by the general course of [667] its examination of the public lands of the United States to the westward of the Mississippi River, would have more knowledge, would have more opportunity for accurate knowledge, of those facts than has the railroad. Of course, it is impossible for the company to show that there are no coal or iron deposits on these lands. It is like trying to prove that there is no gold in a mining claim. It would require not only a surface, but a sub-surface, examination of every section or half section or quarter section, as the case might be. It is enough for the purpose of making out a first-instance case, for the company to show that there are no known deposits of coal or iron upon these lands, and that they are

not surrounded by coal and iron lands, so that there might be some presumption that the veins or deposits extended into their boundaries. Any ordinary and reasonable proof which makes a prima facie case that the lands were open to selection for mineral losses is sufficient to require the government to go forward with its evidence. Now the government has offered in this case no proof upon these questions whatever, and it is necessary, therefore, only to examine, in view of what I have just said, the kind and extent of the evidence offered by the defendant.

Mr. Schwarm testified that he had been in charge of the railway's coal leases for many years; that some of the lands had been classified by the Department of the Interior, pursuant to statute, as non-coal; that some had been withdrawn for coal classification, and later released; and that no part of the balance was located in an area known to contain coal. It seems to me that this evidence is not only competent, but that it has reasonably convincing force. I should say that without question any person familiar with the Palouse country might testify that there are no gold or silver or coal or iron mines there. That is not to say [668] as a geological possibility that there might not be some, but only that none is known at the present time. Mr. Schwarm certainly made a prima facie case in view of the government's classification or non-classification of substantial portions of the land. Without going further into the details of his testimony, plaintiff offering no evidence, I am bound to find that the lands are non-coal.

As to the non-iron character, Mr. Schwarm went no further than to say that he used the utmost care to make sure that the lands had no value for iron. The company in its brief said that geological literature, of which the court might take judicial notice, negatived the possibility of any of the lands being iron lands. I do not consider that Mr. Schwarm's statement amounted to evidence upon which a finding could be based; and as the company did not cite any specific documents, I addressed a letter to counsel on both sides inviting citations to literature and documents bearing upon the case. Mr. Frost supplied me a list of publications, and upon some of them made certain comments which are noted below, with the citations, as follows:

Minnesota.

Monograph No. 52, United States Geological Survey (1911), C. R. Van Hise and C. K. Leith.

Bulletin No. 27, March 17, 1937, the University of Minnesota, by E. W. Davis, entitled "The Iron Ore Deposits of Minnesota."

(The literature in reference to iron deposits in Minnesota is very voluminous. Since the above monograph No. 52 there have been many smaller publications that discuss one or the other of the well known districts.)

North Dakota.

(Our geologists do not know of any publication that mentions an iron deposit in the state of North Dakota, so the documents here mentioned are negative.) [669]

University of North Dakota, Departmental Bulletin No. 11, Geology and Natural Resources of North Dakota, issued by Division of Mines and Mining Experiments in cooperation with North Dakota State Geological Survey.

18th Biennial Report of the State Geological Survey, 1933-1934.

19th Biennial Report, North Dakota Geological Survey, 1935-1936.

Montana.

United States Geological Survey Bulletin No. 507 (1912), entitled, "Mining Districts of Western United States", p. 2 (29).

United States Geological Survey Bulletin No. 715 (1921), Iron Ore Deposits Near Stanford, Montana, pp. 85-92.

United States Geological Survey Bulletin No. 540 (1912), Beds on Blackfeet Indian Reservation, Montana, pp. 329-337.

United States Geological Survey Folio No. 56, Little Belt Mountain Quadrangle, Iron Ore, Woodhurst Mountain (found next to last printed page of folio).

War Department Report on Available Raw Materials for Pacific Coast Iron Industry, Vol. 3, Montana Iron Ore, pp. 2-5 inclusive of Appendix E-1.

United States Geological Survey Professional Paper No. 78; Geology and Ore Deposits, Phillipsburg Quadrangle.

United States Geological Survey Professional Paper No. 74, Geology and Ore Deposits, Butte District.

Idaho.

United States Geological Survey Bulletin No. 507 (1912), p. 26.

Twenty-second Annual Report, United States Geological Survey (1900-1901), Part II, p. 638.

War Department Report on Available Raw Materials for Pacific Coast Iron Industry, Vol. 3, Appendix E-1, pp. 11-15 inclusive.

Washington.

Bulletin No. 27, State of Washington Division of Geology, pp. 37-115.

Annual Report for 1901, Washington Geological Survey, Vol. 1, Part IV, Iron Ores of Washington.

United States Geological Survey Bulletin No. 285 (1906), p. 195.

United States Geological Survey Atlas, Snoqualmie Folio No. 139, Geology of Snoqualmie Quadrangle.

Bulletin No. 2, September, 1917, Washington State University Bureau of Industrial Research, Investigation of Iron Ore Resources of Northwest.

Transaction 30, pp. 356-366, American Institute of Mining Engineers (1901), Cle Elum Iron Ores of Washington.

War Department Report on Available Raw Materials, etc., Vol. 3, Appendix E.-3, pp. 3-21

inclusive. (This report on page 4 shows that the entire production of iron ore for the years 1926-1933 inclusive came from Big Iron Mine, Stevens County.) [670]

The publications themselves were all obtained from the public library and made available to me, except the two Biennial Reports for North Dakota, U. S. Geological Survey Bulletin No. 715 (1921), Iron Ore Deposits near Stanford, Montana, which was missing from the library's bound volume, and the War Department Report on Available Raw Materials for Pacific Coast Iron Industry. The company also submitted a map of each state showing the townships within which the selected lands lay and the location of known iron deposits with relation to them. It advised me that copies of its letter and of the list of publications and the maps would be furnished to plaintiff's counsel. I later received the following letter from Judge Biggs:

Dear Mr. Graves:

We received from Mr. Frost a list of publications in reference to iron deposits, enclosed in his letter to you of May 22nd. The investigation which we have had made of the publications of the United States Geological Survey do not show any published documents of the Geological Survey other than those listed by Mr. Frost, except we find that there is Plate I, Professional Paper No. 184, Pre-Cambrian Rocks of the Lake Superior Region, by C. K. Leith, R. J. Lund and Andrew Leith, U. S.

Geological Survey, 1935, dealing with iron deposits in Minnesota. We know of no publications by the various States other than those listed by Mr. Frost.

We are sending a copy of this letter to Mr. Frost.

Very truly yours,
J. CRAWFORD BIGGS.
Special Assistant to the Attorney General.

I shall hand you herewith the letters from counsel and the maps to which I have referred. Only 320 acres in Minnesota are involved in the proposed substitutions, and though they appear in the general direction of the course of the great iron deposits in that state, they are thirty miles from any indicated occurrence. [671] The bulletin of the University of North Dakota concerning its geology and natural resources contains no reference to iron, dealing principally with the deposits of lignite and clay. Bulletin 507 of the Geological Survey, Department of the Interior, (1912), contains the following comment upon iron in the three remaining states:

(p. 26) "Idaho contains few deposits of iron ore and none of them are mined at present. Iron Mountain, in Washington County, near Snake River, is the principal locality."

(p. 29) "No important deposits of iron are known in Montana. Manganese has been mined at one or two places in Jefferson County."

(p. 42; Washington) "Iron ores are present at a number of places, but are not as yet uti-

lized. Magnetite is found at Snoqualmie Pass, in King County, in connection with metamorphosed limestone, and on Skagit River, in the northern Cascades, as lenses in slate. Chromiferous magnetite appears at Clealum, in Kittitas County, on the contact between sandstone and serpentine. Brown iron ore and bog iron is found at several places in Stevens County—for instance, near Colville and Chewelah."

The references and map for Washington show numerous occurrences, none of which, however, falls within the indicated townships. Mr. Frost's letter states that the nearest deposit is six miles away.

Upon the documents, maps and letters of counsel, I think it should be found that no part of the selected lands have coal or iron.

That "agricultural" means "nonmineral" in the present situation is ruled elsewhere. Nonmineral character, except as to coal and iron, now separately ascertained, was automatically established when the patents were issued upon general losses.

Without further summary, I conclude that the railway's request for substitution should be granted.

[672]

IX. Availability of Withdrawn Lands for Indemnity Selections.

Rulings upon other points have established the amount of the deficiency, the character of lands which might be available as indemnity, the status of certain particular areas, and the adaptability of

certain of the losses. Yet, as I have indicated, substantially all of the lands in dispute are locked up in the national forests and other government reservations.

The lands are within the indemnity limits of the grant, but not having been then selected by the company as indemnity, they were included within various withdrawals. The withdrawals were made, pursuant to statutes, by order of the Secretary of the Interior, Presidential proclamation or executive order, and, in a few instances, by order of the Federal Power Commission. The purposes were principally for national forests though also, to a much smaller extent, for military reservations, Indian reservations, reclamation, power sites, stock drives, irrigation, bird reservations, game preserves, petroleum reserves, flowage, and administrative purposes. In some instances the withdrawals were by specific description, but usually by designation of boundaries. It may be taken as a matter of common knowledge, and is indicated by the testimony of the foresters, that the forest reserves, which constitute the great bulk of the withdrawn lands, include within their boundaries greater or less quantities of privately owned land, interspersed over the areas. In fact, many of the forests include indemnity lands patented to the railway before the reserves were created.

The areas of the odd-numbered withdrawn sections in the different indemnity belts in the several states, with the date and purpose of each withdrawal, and the number of plaintiff's exhibit pertaining thereto, are as follows: [673]

Grant of 1864.

Second Indemnity Limits.

Govt. Ex.	Date	Purpose	Acres	Acres
		Wisconsin		
110	Mar. 15, 1921	Power	40.	
		Minnesota		
111	Jan. 13, 1906	War	.63	
		Montana		
112	Feb. 3, 1892	Forest	5,120.	
113	Mar. 1, 1898	"	279,539.53	
114	July 14, 1899	"	4,004.38	
115	Mar. 19, 1900	Indian	34,088.61	
116	Dec. 18, 1901	Forest	27,828.	
117	Aug. 16, 1902	"	102,517.79	
118	Aug. 24, 1903	Reclamation	425.90	
119	Oct. 31, 1903	Forest	917.80	
120	Jan. 29, 1904	"	19,520.	
121	May 12, 1904	"	41,183.35	
122	Sep. 20, 1904	Reclamation	3,109.50	
123	Oct. 3, 1905	Forest	42,252.01	
124	Jan. 11, 1906	"	1,038.79	
125	Apr. 12, 1906	"	1,473.43	
126	June 2, 1906	"	4,046.05	
127	Sep. 17, 1906	"	498.05	
128	Sep. 18, 1906	"	11,163.14	
129	Oct. 9, 1906	"	1,825.56	
130	Nov. 5, 1906	"	75,785.79	
131	Nov. 6, 1906	"	4,028.94	
132	Mar. 2, 1907	"	50,553.59	
133	Apr. 19, 1912	Power Site	1,117.02	
134	Mar. 18, 1918	Stock Drive	2,305.64	
135	July 1, 1921	Power	90.85	714,460.72

Govt. Ex.	Date	Purpose	Acres	Acres
		Idaho		
136	Mar. 1, 1898	Forest	163,280.	
137	Mar. 21, 1905	"	83,653.38	
138	Nov. 6, 1906	"	520.16	
139	Dec. 11, 1906	"	3,484.	
140	Mar. 2, 1907	"	160.	
141	May 25, 1915	Irrigation	40.	251,137.54
	Total withdrawn, Second Indemnity Limits			965,638.89

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First Indemnity Limits.

Govt. Ex.	Date	Purpose	Acres	Acres
		Minnesota		
142	May 14, 1915	Bird Res.	.27	
143	Oct. 13, 1920	" "	.33	.60
		Montana		
144	Mar. 1, 1898	Forest	294,395.36	
145	July 14, 1899	"	3,902.60	
146	Mar. 19, 1900	Indian	17,962.32	
147	Dec. 18, 1901	Forest	37,512.90	
148	Sep. 4, 1902	"	4,152.20	
149	Oct. 31, 1903	"	8,609.53	
150	Jan. 29, 1904	"	43,533.72	
151	Feb. 12, 1904	"	5,471.51	
152	May 12, 1904	"	73,550.31	
152A	July 14, 1899	"	320.76	
153	Oct. 3, 1905	"	6,949.45	
154	Jan. 11, 1906	"	2,254.32	
155	Mar. 7, 1906	"	520.	
156	Apr. 12, 1906	"	12,860.24	
157	June 2, 1906	"	10,476.19	
158	Sep. 17, 1906	"	3,394.	

Govt. Ex.	Date	Purpose	Acres	Acres
159	Sep. 18, 1906	Forest	9,601.	
160	Oct. 9, 1906	"	320.	
161	Nov. 5, 1906	"	7,968.24	
161A	Nov. 6, 1906	"	4,682.17	
162	Mar. 2, 1907	"	30,355.66	
163	June 22, 1909	Power	40.92	
164	Apr. 16, 1917	Game Pres.	778.04	
165	Mar. 18, 1918	Stock Drive	299.56	579,911.00
		Wyoming		
166	May 22, 1902	Forest	33,560.	
167	Jan. 29, 1903	"	13,607.99	
168	Apr. 21, 1903	Reclamation	1,083.79	
169	June 8, 1904	"	2,006.04	
170	Dec. 6, 1915	Petroleum	360.	50,617.82
		Idaho		
171	Mar. 1, 1898	Forest	114,276.55	
172	Dec. 18, 1901	"	515.	
173	Mar. 21, 1905	"	141,942.72	
174	Jan. 18, 1906	"	784.05	
175	Dec. 11, 1906	"	2,777.77	
176	Apr. 21, 1910	"	160.	
177	Jan. 13, 1914	Power Site	120.	260,576.09
		Carried forward:		891,105.51

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Govt. Ex.	Date	Purpose	Acres	Acres
		Brought forward:		891,105.51
		Washington		
178	Mar. 1, 1898	Forest	72,543.80	
179	Dec. 18, 1902	"	85,193.35	
180	Aug. 25, 1906	"	1,360.	
181	July 26, 1906	"	30,530.07	
182	Aug. 25, 1906	"	5,909.68	
183	Mar. 2, 1907	"	1,172.52	
184	Sep. 17, 1909	Power	583.79	
184A	Feb. 1, 1921	"	133.29	
184AA	May 15, 1924	"	92.74	
184B	Aug. 22, 1904	Reclamation	40.	197,559.24
		Total withdrawn, First Indemnity Limits		1,088,664.75
		Mineral Indemnity Limits		
		Wisconsin		
110A	Dec. 2, 1920	F. P. Project		40.
		Minnesota		
111A	Oct. 24, 1901	Flowage	57.25	
111B	Mar. 22, 1905	"	83.	140.25
		Montana		
185	Sep. 4, 1902	Forest	304,331.14	
186	May 4, 1904	"	9,565.47	
187	Nov. 3, 1906	"	240.	
188	(See note on	Exhibit)	0.	
188A	Aug. 9, 1909	Power	299.71	
188B	Nov. 23, 1914	Admin.	34.42	
188C	Dec. 6, 1915	Petroleum	73.32	314,544.06
		Total withdrawn, Mineral Indemnity Limits		314,724.31
		Total withdrawn, Grant of 1864		2,369,027.95

The apparent total, as thus shown, is 2,369,027.95 acres. In Idaho, however, within the rule that the company may select lands in second indemnity only to the extent of its subsequent losses, about 30,000 acres of nonmineral withdrawn lands are be- [676] yond reach. Also, as held, 3,300.82 acres of Fort Ellis lands are closed to selection. Finally, 92,276.70 acres of the withdrawn lands are conceded to be mineral, and are hence ineligible. These deductions bring the total down to about 2,244,000 acres. By comparing the net total with the ascertained deficiency of 2,220,224.17 acres, it will be seen, assuming that the unindemnified losses making up the deficiency are all such as may be applied to the lands in question, there are just barely enough to make up the deficiency. It may also be noted that the deduction of the inadmissible lands just specified so reduces the indemnity areas that even after having diminished the unsatisfied losses by the quantity of the Portage conflict there is little, if any, surplus. Thus, practically, the Portage question, becomes moot.

To what extent, if any, resort may be had to the withdrawn lands to satisfy the acknowledged losses is now the question. This brings us squarely to the Forest Reserve case, United States v. Northern Pacific Railway Company, 256 U. S. 51, which is both the occasion and the guide for the present adjustment.

There the court put as the test of the validity of a withdrawal for governmental purposes, whether at the time of the withdrawal "the lands available as indemnity" were "sufficient to supply the losses".

If the decision in the Forest Reserve case did not preclude it, strong reason would appear to exist for the position that the right of selection was a valuable right which the government could not infringe by any withdrawals in the indemnity limits without the consent of the railroad, even though suffi- [677] cient acres were left to match the deficiency. If the government might withdraw any lands, it might withdraw the best, so that in effect it, instead of the company, would be doing the selecting. By that view all of the withdrawals in any case would be totally ineffective. The argument is thus put in United States v. Colton Marble & Lime Company, 146 U. S. 615, 618, where a subsequent grant of place lands to the Southern Pacific overlapped the indemnity limits of the Atlantic & Pacific:

> "Suppose, for instance, it should turn out that only half of the indemnity lands were necessary to make good the deficiency, and that one-half of such lands were well watered and valuable, while the remainder were arid and comparatively valueless, obviously the right of selection would be seriously impaired if it were limited to only the arid and valueless tracts. In fact, every withdrawal of lands from the aggregate of those from which selection could be made would more or less impair the value of

> the right of selection. * * * Being within the granted limits of the Southern Pacific, all its rights thereto vested at once, at the time of the filing of the map of definite location, and were not and could not be added to after that time; everything it could have in those lands it had then, and at that time there was an existing prospective right on the part of the Atlantic and Pacific Company to make a selection. That prospective right would be impaired by the transfer of the title of a single tract to the Southern Pacific."

See also Payne v. Central Pacific Ry. Co., 255 U. S. 228, 236, decided six weeks prior to the Forest Reserve case, and quoted above, where the granting act was similar to the Act of 1864, and where the court emphasized that the ultimate obligation of the government in respect of the indemnity lands was on the same plane as that respecting the lands in place. This view, as presented by the company on the authorities noted, appeared to me during the argument as of considerable weight.

Should it be thought that all reservations would be ineffective as against the company's right to "select", it would be [678] necessary to consider a possible distinction as respects second indemnity limits. The act provided that in lieu of general losses, other lands should be "selected" by the company. It also provided that indemnity for mineral losses should be "selected". The resolution, how-

ever, provided that for subsequent losses the company should be entitled to "receive" other lands under the direction of the Secretary. I should be inclined to hold that the company had the same right to select within second indemnity limits as within first and mineral, and the Land Office has made no distinction in practice.

The railway contends that the decision in the Forest Reserve case does not preclude what might be called the theory of the inviolability of the indemnity limits. But I am now thoroughly persuaded that if the Forest Reserve case does not preclude that view, the opinion of Mr. Justice Holmes in United States v. Southern Pacific Railroad Company, 223 U. S. 565, does. There it was held that the right to indemnity depends upon the state of the lands selected at the moment of choice, and that therefore the railway had the benefit of restorations procured by the government to the indemnity limits. Conversely, it must suffer by depletions of the indemnity limits at the hands of the government. Now the Forest Reserve case qualifies the converse of this sweeping principle by the condition that the government may deplete for its own purposes only so long as it leaves a sufficient quantity in the indemnity limits to meet the unsatisfied losses in the place limits. Thus the grant of indemnity may become in the last stage a grant of quantity and not of quality. I am firmly of the opinion that the Forest Reserve case lays down the rule that the government may reserve or appropriate to its [679]

own uses lands in the indemnity limits so long, but only so long, as that which remains is sufficient to meet the unsatisfied losses. The rule does not have all the force of a judgment, because the case was remanded for a further hearing which was never had, the present suit resulting instead. I think, however, that the considered opinion of the court, though never effectuated by judgment, must be regarded by me as conclusive of the subject there under review. I think, moreover, that the court announced a rule which, in the light of the Southern Pacific case, just cited, is reasonable, judicious, and little less than inescapable. Again we must recall that the act is "a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress," Missouri, Kansas and Texas Railway Company v. Kansas Pacific Railway Company, 97 U. S. 491, 497, "illy as it may accord with common law notions." United States v. Southern Pacific Railway Company, 146 U. S. 570, 597.

Many of the plaintiff's exhibits, and much of its oral testimony, were devoted to presenting, alternatively, what counsel called the segregated and consolidated theories. By the segregated theory it sought to show when each of the several indemnity belts, and principally the second indemnity belt in each of the states, became insufficient to meet the losses which it assumed might be satisfied therein. By the consolidated theory it sought to ascertain when the indemnity limits, all taken together, became insufficient to meet the remaining unsatisfied

losses, all taken together. Strangely, counsel say not a word in their brief upon these two alternative theories, though they request findings which suppose the applicability of the segregated theory. There is, however, no longer room for the segregated theory. My rulings [680] upon the use of prior losses in second indemnity and upon substitution lead to the treatment of all losses and lands together, for, in the last analysis, having held that prior losses may be used in second indemnity limits, and that mineral losses may be substituted for subsequent, it is as though all losses were equally flexible, and might be satisfied indiscriminately. This should be qualified by reference to my holding that losses in one state or territory may not be satisfied in the second indemnity belt in another. Moreover, the formula of the Forest Reserve case is to treat all losses and all lands together, and the case would be insoluble under any other interpretation.

The problem, therefore, is to determine when the grant became deficient, by comparing the unsatisfied losses with the indemnity lands which, but for their withdrawal, would have been available. Under the Forest Reserve rule, all withdrawals which, on being made, would yet leave enough land to meet the unsatisfied losses, were valid; all which, on being made, would leave less than enough, were invalid.

At this point the parties differ sharply. The United States contends that in computing the remaining lands, all vacant lands within the indem-

nity limits should be taken into account, including (a) lands subsequently ascertained to be mineral, and (b) lands unsurveyed. The company contends just the reverse.

As to mineral lands, it is indisputable that lands ascertained to be mineral were of that character at the time the grant took effect, and, under the Barden case, were never obtainable. It matters not that in the Barden case the lands were in place. Isn't it obvious to every understanding that lands mineral in 1895-1905 had been mineral from that day when Nature [681] raised up the mountains and put the metals there—just as much in indemnity limits as in place?

As to lands unsurveyed, Mr. Frost cites certain decisions establishing the doctrine that "a survey of public lands does not ascertain boundaries; it creates them". When the grant was made, the vast region from the Missouri River to the Pacific Coast was practically unsurveyed. Now, the provision for indemnity was that whenever any of the granted sections or parts of sections should have been disposed of, other lands should be selected "in alternate sections, and designated by odd numbers". Until alternate sections had been established and designated by odd numbers there could be no selection. It must have been presumed that in the course of orderly survey the boundaries of sections would be created, and that then, and then only, could the right of selection by any possibility attach. Hence the regulation of the Secretary, that only surveyed

lands might be selected, was but an application of the principle laid down by the courts. The United States, in all its history, has never undertaken, except in special cases like the grant of place lands in aid of railroad construction, or the provision for mineral locations, to dispose of its unsurveyed public domain. It is true it permitted preemptioners and homesteaders to settle upon unsurveyed lands. That, however, created no vested interest in the settler, the government promising only that when the land was surveyed the settler should have the prior right.

The government seeks to distinguish between "lands available for indemnity" and "lands available for selection," insisting that lands were available for indemnity by reason of their lying vacant in the indemnity limits, and were thus to be taken into account under the Forest Reserve rule, though not obtainable. I [682] cannot acquiesce in the distinction. I cannot follow the reasoning which says to the company, "The lands are available, but you cannot get them." I think Mr. Frost is justified in saying in his brief that such a distinction is pure juggling with words. I therefore hold that the appropriations of land by the government to its own uses were valid as against the company's claims to indemnity whenever, and only whenever, at the time of the particular appropriation, sufficient vacant surveyed nonmineral lands remained in the indemnity limits, in the aggregate, to meet the aggregate of unsatisfied losses.

The United States, by its method of computation, Govt. exhibits 107, 108 and 109, revised, shows an excess in the indemnity limits until 1902, thus validating the large withdrawals of 1898. The company, however, in its exhibit 137 revised by excluding mineral and unsurveyed lands shows the indemnity limits deficient over 5,000,000 acres just prior to March 1, 1898, thus invalidating the withdrawals of that date. I hold the company's method sound in theory and result.

I think I have not underestimated the responsibility resting upon me in this decision. On March 1, 1898, alone, 1,155,822.58 acres were withdrawn for national forests. By exclusion of unsurveyed and mineral lands from the calculation of available indemnity these withdrawals were invalid, whereas by inclusion they would have been valid. Lesser withdrawals during the next three or four years suffered the same fate. The issue involves, in all, close to one and one-half million acres.

The United States bases its contention upon three propositions, first, that it is the rule of the Forest Reserve case; second, that it is in harmony with the practice of the General Land Office; and third, that it was applied to the Santa Fe grant. [683]

The Forest Reserve case states the applicable rule (256 U. S. 51, 66):

> "* * * it was not admissible for the Government to reserve or appropriate to its own uses lands in the indemnity limits required to supply losses in the place limits."

A more difficult question says the court is "whether it sufficiently appears from this record that the grant was deficient at the time of the temporary withdrawal; that is that the lands available as indemnity were not then sufficient to supply the losses." Because the court said nothing about whether mineral lands or unsurveyed lands were to be counted as available, it is not to be supposed that it intended to say that they should be counted. Most certainly, not mineral lands; they were reserved to the United States, and hence were never available. They were excluded before any computation could begin for calculating the lands required to supply the losses. The court was not called upon to say anything about them. The withdrawal under review was made January 29, 1904. At that time the mineral classification was nearing completion, and great quantities had already been classified as mineral and thus eliminated from possible consideration. The exclusion of them alone, still counting unsurveyed lands, would leave an excess just prior to March 1, 1898, of only about 140,000 acres.

Nor was the court called upon to say anything about unsurveyed lands. The stipulation quoted at page 62 of the opinion, by its terms, excluded both mineral and unsurveyed lands.:

> "The plaintiff admits that when the withdrawal order of January 29, 1904, was issued, the lands patented to the defendant or its predecessor in interest within the primary and all indemnity limits, plus all other lands within the

> primary or place limits, not patented, but which passed under the grant, and also [684] all odd-numbered sections in all indemnity limits which the defendant was entitled to select under the regulations of the land department did not equal the sum total of all the odd-numbered sections lying within the primary or place limits of the grant, and this condition still obtains. * * *''

The only reason the case was not decided upon the stipulation was that the government did not admit that the correct measure of the grant was the aggregate area of all the odd-numbered sections in the primary or place limits.

It is thus apparent the court was dealing only with lands which the company was entitled to select; and as neither mineral land nor unsurveyed land was open to selection it is certain they were excluded in declaring the doctrine of the case. But even without this perfectly obvious consideration, the logic and the whole theory of the case rests upon the assumption that the lands which were left could be gotten by the company. It is neither good sense nor good logic to say that they were available to the company either potentially or otherwise when they could not have been obtained.

The argument that plaintiff's position is in harmony with the practice of the General Land Office is met by the fact that its habit was to recognize all depletions by the United States as valid—condemned by the court in the Forest Reserve case.

Finally, the ruling of the Department of the Interior March 22, 1932, in the case of Atlantic and Pacific R. R. Co. (Santa Fe Pacific Ry. Co.) a photostatic copy of which has been supplied, cites as authority the Department's own ruling in the present case, and adheres to that ruling. It interprets the Forest Reserve case in accordance with the interpretation now urged by counsel, making the same distinction as between lands available for indemnity and lands available for selection. So it all comes [685] around again to the meeting of the Forest Reserve case. I cannot accept either as precedent or persuasive authority the interpretation put upon it by the Department. This court must determine for itself what the Forest Reserve case establishes, and that determination cannot be aided by any effort of the Department to maintain its own previous ruling and to make the Forest Reserve case justify it.

The company's exhibit was prepared upon the supposition that the lands east of Duluth in conflict with the Portage road, found to be 347,141.24 acres, were proper base for indemnity selections, and without reference to the Montana place error of 5,435.46 acres; but the rulings adverse to it upon these points do not convert the deficiency into an excess March 1, 1898, so as to justify any part of the withdrawals of that date, the deficiency prior to those withdrawals having been, as stated, over 5,000,000 acres.

The company did not attempt to show the status of the grant at any date earlier than March 1, 1898. During the introduction of testimony its counsel stated that it would let the withdrawal of 5,120 acres in 1892 go, unless it were able to make a purely legal argument with respect to it. None was made except the argument that the United States had no right to invade the indemnity limits under any circumstances, which I have rejected. I must, therefore, consider that withdrawal valid.

In applying the term invalid, or any similar expression, to the action of the government in erecting the forest reserves, or in making withdrawals for other purposes, it should not be implied that there was anything reprehensible about it. Most of the withdrawals were made before the extensive losses and depletions [686] had been established by the mineral classification. Doubtless the government miscalculated the mineral as seriously as did the railway. But more particularly, the government had no special designs on the odd-numbered indemnity sections. It was withdrawing huge areas into which the indemnity sections happened to fall. Should the company have been permitted to select and sell them, the boundaries of the forests would have still remained, and the conservation policy of the government would not have been frustrated, though I do not question the wisdom of the act of 1929 in taking the company's selection rights by eminent domain, which, in substance, is what it does.

Coming down to the present time, the deficiency now, as found, is 2,220,224.17 acres. The total in the forests and other government reservations, deducting surplus Idaho second indemnity Fort Ellis, and conceded mineral, as computed above, is about 2,246,000 acres. Thus the deficiency of 5,000,000 acres in 1898 has become an excess of perhaps 24,000 in 1937. This has resulted from the progress of survey and selection, by re-determination as to mineral character, by corrections of the place limits, by restorations to the indemnity limits; in short, by a variety of diminutions of, and charges to, the grant and by net enlargements of the selectable land in the indemnity limits from whatever cause. The small excess which may now perhaps exist validates to that extent the appropriations by the government. Though it may retain this quantity, the right of selection is with the company. The withdrawals having been invalid, the occurrence, subsequently, of an excess, would not legalize any particular withdrawal. If any, the first in point of time; but I do not see how it would be possible for me to make any distinctions from among the large simul- [687] taneous withdrawals on March 1, 1898. I hold that, all withdrawals except that of 1892 having been illegal in the first instance, the company, with that exception, may make its selections out of all the withdrawn lands to the extent of the deficiency as found, subject to these minor qualifications:

(a) The Fort Ellis restored lands are excluded from selection;

(b) In Idaho second indemnity the company may not make selections in the aggregate, including those heretofore made in that belt, in excess of its subsequent losses in Idaho. The first withdrawal therefrom having been for 163,280 acres en masse, it is my opinion, upon the same principle that forbids discriminations between the simultaneous withdrawals from the grant at large, that the right of selection is with the railway.

(c) Lands conceded to be mineral may not be selected.

The government, insisting that other base be supplied in support of selections now resting upon the Portgage base, has not made an issue concerning the character of losses thus required. Similarly as to lands, generally, patented in error. It is obvious, particularly, that, within the terms of the granting act, no losses are applicable to the lands beyond the sixty mile limit in Idaho and Montana, erroneously patented, though, by concession, they have been charged to the grant. My rulings have made the several sorts of losses, in practical effect, interchangeable, and have dispensed with the tract-for-tract assignment. The very necessities of the case appear to require these things, the problem becoming one not of supplying the losses, but of satisfying the deficiency. [688]

There remains a somewhat puzzling difficulty to which counsel have given no attention either in

testimony or argument. Much of the land in these forest reserves is unsurveyed, and the practical difficulty of selecting is apparent. I have concluded, however, rather than to delay this report further, that the detail of selection may be left open to a subsequent hearing. The decree now to be entered is in its nature, and I suppose will be in form, interlocutory, under the provisions of the bill to supplement the act of June 25, 1929. With my present light upon the subject, I should be inclined to hold that a protraction of the survey of the lands as yet unsurveyed should be made and the selections based thereon. The excess at present is so small—about 24,000 acres out of 2,244,000—as to bring the case almost within the rule of the Land Office and the courts, that no selection is necessary when all the lands are required to satisfy the deficiency. All are appropriated. St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company, 139 U. S. 1, 19; United States v. Colton Marble & Land Company, 146 U. S. 615, 616; 25 L. D. 511. Identification upon the ground for purposes of valuation would still be necessary, but beyond that there would be no problem of selection. I anticipate, should the principles of my conclusions concerning these unsurveyed lands be sustained, counsel will have no difficulty in stipulating a method of selection.

What I have said just above is in view of the provisions of the act of June 25, 1929. Although the language is somewhat contradictory, I feel con-

vinced that by that act it was intended that a final decree should be made in this case of the land grants to the Northern Pacific, and, while it is true, as I think and have held, that unsurveyed lands could not be selected in course of re- [689] gular administration of the grant, yet that difficulty should not stand in the way of making the selections here referred to. The government has placed the lands in reservations, and has declared its intention to keep them. They could, therefore, never be available to the company, and it seems to me that it makes but little difference at this time whether they are surveyed or unsurveyed. The railroad being entitled to receive them whenever they were surveyed, I think the principle that equity regards that as done which ought to be done should apply; and the lands will now be treated as surveyed. The only thing necessary for the purpose of selection and subsequent valuation is identification, and that may be had for all practical purposes as well by protraction as by actual survey.

This concludes the discussion of the grant of 1864. I have endeavored to rule upon some minor points which were not discussed in the briefs, but which seemed to be necessarily involved. I have refrained from reference to many points of detail upon which I think the parties to be in agreement, or which will be determined by general principles which I have stated. It has been my purpose to make this report sufficiently comprehensive to afford a basis for the selection by the company of the specific lands for

which it is entitled to compensation, and for the quieting in plaintiff of such as remain. The parties will best know to what extent the selection lists now on file as exhibits are suitable as final descriptions, and in what manner, and when, they should be amended to comply with the final decree. I do not consider a tract-for-tract specification of losses necessary, but think the quantity by which the grant is found deficient may be selected from the areas designated, subject to the qualifications stated. [690]

GRANT OF MAY 31, 1870.

I. The Grant.

The act of 1864 authorized the Northern Pacific to construct a line

> "to some point on Puget's Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunkline at the most suitable place, not more than three hundred miles from its western terminus;"

The Joint Resolution of 1870 authorized it

> "to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound;"

The resolution thus designated as a branch the portion of the road across the Cascades, formerly part of the main line, designated as part of the main line the route down the Columbia, formerly called a branch, and continued the main line down the Columbia to some point on Puget Sound.

Maps of definite location of the portion of the main line from Kalama north to Tacoma were filed in 1873 and 1874, and for the portion from Kalama south to Portland in 1882, and the road thus located was constructed. The part of the projected main line between Pasco and Portland was not definitely located or constructed, and the grant pertaining to it was forfeited by the act of September 29, 1890, 26 Stat. 496. Maps of definite location of the branch from Pasco to Tacoma were filed in 1883 and 1884. Since under both the act and the resolution the terminus of the main line was at Puget Sound, the net result of all this was that physically and legally the Pasco-Tacoma route became part of the [691] main line, and the Tacoma-Portland route a branch.

At first blush the simple reference to the privileges, grants and duties of the 1864 act seems to constitute a rather slender expression of an intent to grant lands in aid of the extension from Portland to Tacoma. That such was the purpose and effect, however, is easily discernible in the debates, and, moreover, is shown by comparison with the joint resolution of April 10, 1869, 16 Stat. 57, granting to the Northern Pacific a right of way to build this very line, but providing that the company should

not be entitled to any subsidy in money, bonds or additional lands in respect of such extension. While there is no doubt of the intent, it may be observed that United States v. Northern Pacific Railroad Company, 193 U. S. 1, to which I shall hereafter refer, recognizes it. A precedent for the incorporation of a grant by reference to an earlier grant may be found in the statutes involved in United States v. Southern Pacific Railroad Company, 146 U. S. 570, where a grant to the Southern Pacific for an additional line was made by reference to a previous grant to the same company for another line. By reference to the 1864 act, therefore, Congress granted to the company, in aid of the portion of the extended line from Portland to Puget Sound, the odd-numbered sections in a quadrilateral twenty miles on each side of that line in the state of Oregon and a quadrilateral forty miles on each side in the Territory of Washington, with a ten mile indemnity belt for general losses and a fifty mile indemnity belt, measured from the line of the road, for mineral losses.

As appears in the discussion of the 1864 grant, the joint resolution of 1870 provided a second indemnity belt for satisfaction of losses to the amount suffered subsequent to July 2, 1864, [692] in any state or territory where the first indemnity belt was insufficient to meet the losses at date of final location in the particular state or territory. Should that apply to the newly subsidized extension from Portland to Tacoma? Plaintiff urges that it should

not; that Congress intended to provide second indemnity only to take care of situations where, in the interval between 1864 and 1870, settlers had gone in and depleted the limits originally prescribed. There would be great force in the argument if it were not that the resolution plainly provides otherwise. The second indemnity provision is set out in full at page 2 of this report. The phrase "said main line" where it twice occurs, refers back, both grammatically and logically, to the "main road to some point on Puget Sound, via the valley of the Columbia River." No distinction is made between the old main line and the new. It therefore seems clear that the resolution authorized second indemnity opposite the new line, provided, of course, the lands in first indemnity, at the time of final location in the particular state or territory, Oregon or Washington, were insufficient to supply the losses.

The United States refers at length to the debates in the Senate and House to show that the purpose of the new belt was to provide indemnity for losses opposite only the 1864 line. Recent decisions appear to authorize resort to the debates to ascertain intent, with increased liberality; but, still, where, as here, the language is unambiguous, there is no excuse for going outside the terms of the statute itself.

The Commissioner was so instructed by First Assistant Secretary Pierce in Northern Pacific Railway Company (Nov. 24, 1908) 37 L. D. 272. Plaintiff claims that the Assistant Secretary's opinion is obiter. Supposing so, I reach the same conclusion independently of it. [693]

II. Tacoma Overlap.

The line from Portland and the branch over the Cascades, as located and constructed, met at Tacoma at practically right angles, thereby creating a quadrant southeast of Tacoma, in which the 1870 grant is said to overlap the earlier, hence the "Tacoma Overlap", which presents the major question in the 1870 grant, N. P. exhibit 142, or, more conveniently, the small sketch accompanying it, shows the situation.

Two fundamental principles established by the courts as between senior and junior grants to different companies should be stated. First, when the senior grantee definitely locates its line, the lands within the place limits as thus determined pass to that grantee by relation as of the date of the grant. So, likewise, in the case of the junior grantee, its definite location relates back to the date of its grant. It therefore follows that the senior grant takes the land to the exclusion of the junior grant. This result is not at all affected by the respective dates of definite location. "Congress intends no scramble between companies for the grasping of titles by priority of location." Mr. Justice Brewer in United States v. Southern Pacific Railroad Company, 146 U. S. 570, 597-598. Second, if the junior grant should contain indemnity provisions such as those in both the Northern Pacific grants, then the lands within the overlap would be lost to the junior grantee, and it might have indemnity therefor.

Now the precise point to the Tacoma Overlap question is whether these principles apply in a

senior and a junior grant to the same company, there being no explanatory or declaratory language in either grant upon the subject. In other words, as a bare matter of [694] interpretation of the language of the two grants, may the Northern Pacific, because of this overlap, claim a right to indemnity in behalf of the Portland-Tacoma road under the grant of 1870, because it got the lands for the Cascade route under the grant of 1864 and so could not get them again.

Counsel on each side cite certain cases claimed to require a determination of this question one way or the other. I shall, therefore, first examine those cases.

Judge Biggs puts in the forefront what are called the Barney cases, 6 Fed. 802; 113 U. S. 618; 24 Fed. 889; 117 U. S. 228. The facts as stated by the court are many and complicated. No good purpose would be served by restating them. So far as any question here is concerned, the substance of those cases is about as follows: Congress had made a grant to the territory of Minnesota to aid in the construction of a railroad running generally easterly and westerly. The benefit of that grant ultimately came to the Winona and St. Peter Railroad Company. By the same act it granted other lands for a road running northerly and southerly, which ultimately got into the hands of the Minnesota Central, crossing the Winona and St. Peter. Both lines were definitely located. The Winona and St. Peter was built to a point in each direction beyond the

crossing, and I infer, but am not certain, that so was the Minnesota Central. By a subsequent act Congress granted to the state, for the benefit of these and other railroads, an additional four sections per mile, excepting certain lands, however, in these words (113 U. S. 621);

> "That any lands which may have been granted to the Territory or State of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from the full quantity of lands hereby granted." [695]

49½ miles of the Winona and St. Peter were constructed before the additional grant, 53 39/100 after. So far as of importance here the litigation turned on what was thus excepted from the grant. Mr. Justice Field, in writing the opinion on the first appeal, said (113 U. S. 628):

> "The reservation of the lands previously granted to Minnesota from the grant of the additional four sections, that is, from the extension of the original grant of 1857, was only a legislative declaration of that which the law would have pronounced independently of it. Previous grants of the same property would necessarily be excluded from subsequent ones."

I am not at all certain that I understand the Barney cases. Counsel on each side profess to know all about what they mean and what they hold, and

will doubtless be able to aid Your Honor in understanding them. I should dislike very much, however, to base an opinion upon the Barney case. As I gather, they declare the rule that where lands have been granted to one road, a subsequent grant to another road does not include the previously granted lands. This, of course, must be so; but the question remains, notwithstanding the previous grant, might not the second grant be so phrased as to provide that, because certain lands had been previously granted to another road, the road receiving the second grant might have indemnity on account of the loss? So far as I can make out, the cases throw no light whatever upon that subject, and, therefore, do not give much aid in reaching a conclusion as to the Tacoma Overlap.

United States v. Oregon and California Railroad Company 164 U. S. 526, comes nearer to the mark, but still does not reach precisely the question. There a grant had been made which ultimately came into the hands of the Oregon and California. The grant was to aid the construction of a main line from Portland to Astoria, [696] and of a branch line from a junction at or near Forest Grove on the main line southerly to the Yamhill River at McMinnville. Both main and branch lines were definitely located. The main line, however, was built only to a point near Forest Grove, and subsequently the remainder of the main line grant was forfeited. The branch from near Forest Grove to McMinnville was built. The suit was to quiet title to lands fall-

ing within the northwest quadrant at the junction between the located main line and the constructed branch. The court held the main line absorbed the grant within its place limits, and that within those limits, therefore, the branch line received nothing. This is not a full statement of the case but it seems to be sufficient for any purpose here. In the report is a plat illustrating the situation. While the grant contained an indemnity provision no claim was made under it. The single question was whether the place lands on the main line went to that road to the exclusion of the branch line. Now there are two features distinguishing that case from this. The first is that the grant was by a single act, and, therefore, had to be construed as a single grant, and the second, that no indemnity question was presented. Had the branch line admitted that it did not earn any place lands within the primary limits of the main line, and sought indemnity therefor, the question in that respect would have been the same as here. While, therefore, this case is not controlling, it has a certain persuasive force. It recognizes the principle that Congress, by the general terms of the act, did not intend to make two grants of the same lands to the same company, holding that the lands within the overlap were absorbed by the main line location and that the branch line got nothing within the conflict. The Court of Appeals for this Circuit had held the contrary, but the judgment was reversed. The [697] Supreme Court relied somewhat for its conclusion upon the doctrine of

strict construction of governmental grants, and quoted approvingly the following language from Mr. Justice Harlan in Sioux City & St. Paul Railroad Company v. United States, 159 U. S. 349, 360:

> "If the terms of an act of Congress, granting public lands, 'admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.' Leavenworth &c. Railroad v. United States, 92 U. S. 733, 740. Acts of this character must receive such construction 'as will carry out the intent of Congress, however difficult it might be to give the full effect to the language used if the grants were by instruments of private conveyance.' Winona & St. Peter Railroad v. Barney, 113 U. S. 618, 625. 'Nothing is better settled,' this court has said, 'than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion.' Lau Ow Bew v. United States, 144 U. S. 47, 59.
>
> Giving effect to these rules of statutory interpretation, we cannot suppose that congress intended that the railroad company should have the benefit of more lands than it earned."

Plaintiff insists that under the doctrine in pari materia the two grants to the Northern Pacific

should be considered together as one grant. Of course, they must be construed with reference to one another, but neither the pari materia rule nor any other doctrine can obscure the fact that one grant was in 1864 and the other in 1870, and consideration of the two acts with reference to each other must keep that fact in view and give it whatever weight it may be entitled to under all the circumstances.

Mr. Frost put in evidence the record in the Forest Reserve case and claims that the measure of the grant of 1864, as stated by Mr. Justice Van Devanter, is res adjudicata. I must suppose that counsel has overlooked the circumstance that there was no final [698] judgment in the Forest Reserve case. There had been a judgment in the lower court, which was reversed, and there the matter ended. Of course, there could be no adjudication without a judgment. To adjudicate is to adjudge. Counsel do not claim that it is res adjudicata as to the 1870 grant, but maintain rather than the principles, the rules, there announced govern the 1870 grant in precisely the same manner as that of 1864. Naturally, that is true in so far as the same question may arise under the two grants. The Tacoma Overlap, however, did not, and could not, come up in the 1864 grant, and there was no occasion for the court, therefore, to say anything about it. Indeed, I doubt if the Supreme Court had ever heard of the Tacoma Overlap. It is true that the Jones adjustment was in the record and that computation shows the lands

within the overlap were excluded from the area of 1870 grant; but no question about it was presented. In fact, there was no question anywhere about it, as I shall point out presently. The Supreme Court laid down rules for the admeasurement of the 1864 grant, where there was no overlap, and therefore, of course, no overlap question. The overlap resulted from the grant of 1870 and must necessarily be taken into account in determining the measure of that grant. I am not overlooking the doctrine that the decision in the Forest Reserve case, and the grounds of it, became the law of the case in all subsequent steps taken therein. But this is a very different thing from the doctrine of res adjudicata. I think the Forest Reserve case has nothing to do with the Tacoma Overlap.

Defendant strongly insists upon the opinion of Secretary Noble in Chicago, St. Paul, Minneapolis & Omaha Railway Company (Oct. 11, 1889) 9 L. D. 483, 486. I do not understand the facts of that case. There is not enough stated in the opinion to enable [699] anyone to understand it. The point came up as one of many instructions to the Commissioner upon the adjustment of the grant to that road. To go back to the statutes and then have before me the record in the case, if that were possible, and to understand the adjustment of that grant so as to build up thence a conclusion as to what Mr. Noble meant by his decision, or by his language, or come to any clear comprehension of the case, would require as much labor as to decide the present ques-

tion now; and to do this would extend the report beyond any permissible length. If Mr. Noble meant to say that by some recognized rule of construction the intention of Congress was plain, then I should have no quarrel whatever with his conclusion on the point. But he does not inform us how he arrives at the intention of Congress. He simply states it. If he meant to say by the declaration, "no technical rules of law or adroit schemes of adjustment should be permitted to calculate the beneficiaries of Congress out of the bounty intended for them", he had disregarded established rules of law in arriving at the intention of the legislature, then I should decline to follow him. He nowhere informs what technical rules of law he had in mind, nor what the adroit schemes of adjustment may have been. I feel bound to say as to this case, therefore, that I presume it was correctly decided on the facts before the Secretary, but that I have no possible means of knowing whether those facts are sufficiently like the facts in the Northern Pacific grants to justify the use of the opinion as a precedent. Nothing in the opinion lays down any general legal principles which might throw light upon the construction of the Northern Pacific grants. I, therefore, as I did with the Barney cases, lay it to one side. [700]

United States v. Northern Pacific Railroad Company, 193 U. S. 1, is clear, intelligible and easily understood. The court held that as the Northern Pacific had never definitely located its line down the Columbia to Portland, and as it had been for-

feited, nothing stood in the way of the grant of 1870 taking the land. The imaginary overlap had nothing to do with it. The whole case there turned on the question whether there was a conflict between the two grants. Counsel, recognizing this, constructed a theory that Nature definitely located the line down the Columbia, thus conveniently relieving the company of the necessity. The court rather curtly disposed of that theory and held, there having been no definite location for the earlier grant, there was no overlap.

So, also, Northern Pacific Railway Co. v. De Lacey, 174 U. S. 622, declares only that the grant of 1864 conferred the land rights upon the branch over the Cascades, and that this grant was not superseded by the resolution of 1870. Had the branch over the Cascades never been definitely located or built to Tacoma, then there would have been no Tacoma Overlap, and undoubtedly the 1870 grant would have carried the land to the Northern Pacific, as it did at Portland. I should have no trouble, without those authorities, in holding the same thing; but obviously the question here is altogether a different one. The Cascade branch was built, the Portland line was built, and the two coming together at right angles created the overlap.

I have diligently sought to obtain some clue to the intention of Congress as to this question other than the language employed. I have not been able to find anything worth much.

The Congress in 1870, elected in 1868, was overwhelmingly in control of men who believed in exten-

sive railroad building and [701] land grants to aid. Public opinion, however, upon this question was rapidly changing. Already Congressmen doubtless heard the mutterings resulting in the Granger movement of the early 70s, which was largely responsible for the close election of 1876. There is discernible in the debates a strong, sometimes even a bitter, opposition to the grant of 1870. The question of an overlap in the two grants apparently never occurred to any one. Counsel have diligently gathered up the debates in both Houses over other features of the resolution, but have cited me to nothing on that phase. Mr. Davenport, examining the debates, is unable to find any reference whatever to the subject. This is strange because, had the lines been built as authorized, an overlap was certain to occur at or near Portland, and there might, indeed probably would be, one at Puget Sound, depending upon whether the termini of the Cascade branch and the Portland-Tacoma line should be fixed at the same point. It seems almost certain, had it entered the mind of any debater, that this question might come up, and that it might be claimed that there was a double grant, both at the point near Portland and at the common terminus of the two roads on Puget Sound, the opposition would have stressed it. It is difficult for me to comprehend how it could have been overlooked. It can be accounted for only in one of two ways—either that no one in Congress, at least no one of the minority, ever thought of the question; or else that no one supposed the con-

tention now put forward by the company could ever be made; in other words, the opposition must have supposed that the frame of the resolution did not by any possibility permit a construction allowing a double grant at the two points of junction. Any inference drawn from this circumstance is so indefinite and uncertain that I should not care to rely upon it as showing congression- [702] al intent. I only mention it in passing as a rather curious circumstance of uncertain bearing.

So I feel bound to come to a decision upon principle, as I find no authorities which serve as a precedent, nor other clue. We are left without any aid except the language employed, and, after all, the old-time rule of taking the language as it stands and interpreting it is the safest guide.

One is likely to be misled by the phrase often used in the testimony "lost to the grant". One gets an impression from the use of that term that "lost to the grant" refers to the loss without reference to the grantee. What that phrase means is that when lands within the place limits intended for the grantee by the granting act could not be obtained by it because of certain reasons stated in the act, the grantee had lost them. The phrase "lost to the grant" is purely a bookkeeper's term, intended to express this legal conception. Frequently, too, the phrase "lost to settlers" is used, meaning, of course, lost to the grantee because of settlement. Of course, where the grants are to different companies this construction is without importance; but here, where

both grants are to the same company, it may have some bearing.

As noted above, the grant of 1870 was in these words:

> "To locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation * * *."

Of this clause two things are to be noted. The first is, in the language of Mr. Justice Brewer in United States v. Southern Pacific Railroad Company, 146 U. S. 570, 595:

> "It matters not that the act of 1871 in terms purports to bestow the same rights, grants, and privileges as were granted to the Southern Pacific Railroad Company by the act of 1866. That merely defines the extent of the grant and the character of the rights and privileges; [703] it does not operate to make the latter grant take effect by relation as of the date of the prior grant, and thus subject the grants to the two companies to the rule controlling contemporaneous grants * * *."

In the next place, the clause does not undertake to include in the grant of 1870 any words or phrases from the grant of 1864. It merely confers the same privileges and grants, and imposes the same duties, as were conferred and imposed in the act. Whatever was conferred or imposed in the parent grant, as determined by the court where necessary, was transferred in exactly the same sense and to the

same effect to the junior grant. It is as though the resolution in this respect had been a part of the grant of Section 3 of the act of 1864. It to my mind, therefore, is perfectly obvious that, when we have determined the significance and effect of the original grant, we have determined the meaning and effect of the supplementary grant in the joint resolution.

By the act of 1864 indemnity was provided

> "whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of * * *."

The term "shall have been granted" obviously means granted to somebody other than the Northern Pacific. So the term "or otherwise disposed of" refers to a disposition to some person other than the Northern Pacific. There was no Northern Pacific until the act making the grant created it. Therefore it cannot be disputed that the phrase means what I have just said. This aside, however, the whole construction and intent of this indemnity provision is just this and nothing more: "We have granted you, the Northern Pacific," say the United States, "certain lands, but we do not know, by the time you make definite location of your line, whether those lands will be available or not. Homesteaders and preemptioners [704] may have taken some of it; we may have reserved some portion; we may have granted some portion, or in some other way

have disposed of it, so that you cannot obtain it, therefore you may have indemnity in lieu of the lands that you have thus lost."

So when the joint resolution was passed, the United States was made to say to the Northern Pacific, as to the Portland-Tacoma line, precisely the same thing it had said in the act of 1864, no other or different. I repeat, the resolution did not adopt the language of the act. It adopted the result, the legal effect of that language. To put it another way, whatever resulted from the granting and indemnity provisions of the act of 1864 likewise resulted from the grant of 1870, no more, no less, no other and no different. I cannot comprehend reasoning by which it is sought to be maintained that when the privileges, grants and duties of the act of 1864 were applied to the new road they took on any new, or additional or different sense. If I am right, then it follows, of course, that the terms "shall have been granted * * * or otherwise disposed of" mean just what they meant in the Act of 1864, no more, no less, and therefore they do not, and cannot by any possibility, include a previous grant to the Northern Pacific or a previous disposition to the Northern Pacific.

The argument of counsel for the company comes just to this, that because the government had already granted these lands to the Northern Pacific, they should be treated as "shall have been granted" in the joint resolution of 1870, although not possibly so to be interpreted in the Act of 1864; and because

the Northern Pacific did not get them a second time, it should have indemnity for them now. Certainly, Congress might have so phrased the resolution of 1870 as to make it mean that, but it is to my [705] mind so clear that they did not do so that argument will add nothing to the conclusion. What, obviously, Congress meant to say by the joint resolution is "If you will build this line from Portland to Tacoma, we will make you a grant of land in the same quantity per mile and on the same terms and conditions we have already granted you by the act of 1864, but if by reservation or grant to some third person or through settlement under the land laws of the United States, you do not get that land, you may have indemnity therefor." The most latitudinary construction even could not make out of the language employed anything more. The United States said to the Northern Pacific, "If you will build this line, we will grant you this land; we will give you indemnity for losses along the line to third persons; but likewise, if by the location of your line across the Cascades you already get it, we will not give you indemnity because you did not get it a second time."

It is unnecessary in the view I take of this question to invoke the doctrine of strict construction. The most liberal rule would not carry the grant, as claimed, to the company; but most assuredly it cannot be reasonably insisted that there is not a great and besetting doubt as to whether the result claimed was intended by Congress.

> "If the terms * * * 'admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor.' "

No reasonable, I might say no possible, argument can be made that the claim under the joint resolution does not come squarely in letter and spirit within the quoted language.

The views expressed above receive strong confirmation from the action both of the Interior Department and of the company [706] with respect to the lands in this overlap. In the Jones adjustment of 1906 the lands were excluded from the grant of the joint resolution. In the tentative adjustment (Govt. exhibit 66) transmitted to the Attorney-General, the forester and the company December 19, 1923, the overlap area is not deducted from the measure of the grant. Following the forester's brief the area was deducted and the deduction is shown in the Commissioner's report to the Joint Committee of Congress. In all subsequent action or opinion by the Department, the deduction has been maintained. There is no proof before me that the company made any objection until the hearings before the Joint Committee of Congress. There is no evidence that at any time before those hearings it put forward any claim to be entitled to have indemnity for the lands within the overlap. When the Cascade branch was located in 1884, the state of the grant under the joint resolution was fixed. If indemnity might be had for these lands as now

claimed, the grant was deficient, and a second indemnity belt should have been laid down. If, on the other hand, indemnity could not be had, then there was no deficiency authorizing second indemnity limits. Apparently neither the government nor the company ever thought of laying down a second indemnity belt until 1906. There is no proof that the company asked for one and no proof that the government ever considered it. Explanations are offered as to how it came to be done in 1906. The Jones adjustment prepared in that year indicated a deficiency in the state of Washington under the grant of 1870, and counsel for the government surmise that the Land Office thereupon erroneously laid down the second indemnity limits for that state without considering that the authority for it should have been governed by the status of the grant, not at the time of the adjustment, but at the date of final location. [707] Counsel for the railway surmise, likewise, that the Land Office laid down the limits because it considered the Tacoma Overlap a loss, and hence that the grant was deficient at final location. I do not know if either explanation is correct, but somehow or other the second indemnity belt was laid down in the state of 1906.

Now, as already said, the company became entitled to indemnity in this overlap, if ever, upon the final location of the Cascade branch, and yet from that time forward it has never tendered as a loss to the 1870 grant any of the lands within the overlap. It never sought in any way to obtain

indemnity for these lands or any of them, though during that whole period there were surveyed free lands in first indemnity, and afterwards in second indemnity, available for selection for such loss. It cannot be said, either, that this was an oversight. Some 30,000 acres of overlap lands were lost to settlers. Indemnity selections were promptly made for the lands so lost, the selections being in the indemnity limits of the grant of 1864 for all but 1792 acres, which were selected in the indemnity limits of the 1870 grant or in indemnity limits common to both grants; and all of that except 40 acres was selected at a time when the two grants were not being administered separately, and, as indicated, even the 40 acres was lost to settlers. Not an acre was tendered as base for indemnity by reason of having been taken by the prior grant.

It is impossible for me to believe that, had the Northern Pacific supposed it was entitled to indemnity for these lands because of the prior grant, that is, entitled to get twice as much land because of the two roads, as it had gotten by the one road, it would have laid by through all these years and never asserted the right. It is conduct that would be inexplicable if applied to any [708] one else; if applied to a private citizen, I should say, or any other sort of a corporation; it is doubly inexplicable when applied to this defendant, because throughout its long career it hastened, sometimes precipitately and to its own advantage, to make lieu selections. Even in this overlap it tendered for indemnity every acre

taken by settlers as base under one grant or the other, but not one acre did it tender as lost to the junior grant by reason of belonging to the senior.

Mr. Frost asserts that there was no occasion to tender overlap losses, as there was always an abundance of losses from other claims to take up such indemnity land as was from time to time available. He, of course, was not counsel during that period, and what he offers as explanation is only his present best theory upon the subject. It is possible to suppose that it may have so happened, but it is so improbable as to put the supposition beyond the bounds of reasonable inference. I think the true explanation is the apparent one—that through all those years the company was not claiming this indemnity.

I conclude, therefore, upon consideration of all that bears on the subject, that the lands within the Tacoma Overlap can not be regarded as "lost", and that in consequence indemnity may not be had for them.

III. Minor Questions.

8,568.29 acres were selected in the indemnity limits under lieu or relief acts. I held under the 1864 grant that the company should not be charged, or as it says, charged a second time for such selections. The same ruling applies here, of course. [709]

80 acres of unsurveyed lands lie in first indemnity, outside reserves. I hold this should be charged for the purpose of the adjustment, and ultimately patented.

IV. Substitution of Losses.

As a result of my conclusion upon the overlap, there was no deficiency in the state of Washington at the date of the railway's last definite location. That is, at that date there were in the place and first indemnity limits in Washington, unappropriated, "the amount of lands per mile granted by Congress within the limits prescribed by its charter". Hence the condition did not happen for laying down second indemnity limits in that state, and no occasion for substitution exists. Even should I be in error on the overlap, so that second indemnity is proper, still, strictly there is no need of substitution, for there is vacant mineral indemnity to meet the unsatisfied mineral losses, and, as I have said, any unsatisfied prior losses may be used in second indemnity directly without the mechanism of substitution. Should it appear that substitution would enable the railway to utilize any of its losses not otherwise susceptible of use, I hold that it may be allowed under the principles established with respect to the 1864 gant.

28,436.14 acres of losses were used to select lands in indemnity limits of the 1864 grant. That quantity was charged to the adjustment of the 1864 grant, and has been credited to the 1870 grant. This addition to the 1870 losses will not, however, aid the grant, for, as will next appear, there is no place to satisfy it. [710]

V. Availability of Withdrawn Lands for Indemnity Selections.

Upon the rulings now made the deficiency under the grant of 1870 may be stated thus:

		Acres
Deficiency as calculated by plaintiff		572,724.18
Add: Selections under lieu acts		8,568.29
Deficiency:		581,292.47
The same result is reached by reference to the deficiency as calculated by defendants, or		1,218,953.46
Less: Unsurveyed in first indemnity	80.	
Tacoma Overlap	637,580.99	637,660.99
Deficiency:		581,292.47

The unsatisfied losses are (N. P. exhibit 141, revised):

Unsatisfied prior losses	788,726.83	
Less: Tacoma Overlap	637,580.99	151,145.84
Unsatisfied subsequent losses:		
Washington	122,791.21	
Oregon	278,060.93	400,852.14
		551,997.98
Add: 1870 losses used in selections in 1864 limits		28,436.14
		580,434.12

As noticed under the 1864 grant, and for the reasons stated there, the unsatisfied losses do not exactly equal the calculated deficiency, but they do approximately. [711]

The withdrawn lands are as follows:

Grant of 1864

Second Indemnity Limits

Washington

Govt. Ex.	Date	Purpose	Acres	Acres
220	March 1, 1898	Forest	199,608.18	
221	Dec. 18, 1902	"	11,160.	
222	Aug. 27, 1906	"	2,233.48	213,001.66
		First Indemnity Limits		
		Washington		
223	March 1, 1898	Forest	127,595.81	
224	Dec. 18, 1902	"	22,538.98	
225	Aug. 27, 1906	"	5,120.	
226	July 2, 1910	Power	393.05	
227	Dec. 15, 1913	"	80.	155,727.84
	Total withdrawn, Grant of 1870			368,729.50

It is evident that the withdrawn lands are not nearly sufficient to meet the unsatisfied losses. Vacant lands outside reserves are comparatively negligible. Nevertheless, the condition for laying down second indemnity limits in Washington not having happened, the lands within those limits may not be used in reduction of the deficiency. They were never rightfully available for selection, and, of course, the forest withdrawals therein are valid and the company can not have compensation for any of them.

Though there was no deficiency in Washington at final location, there was in the grant as a whole.

All the place lands in Oregon had been lost to the grant, the deficit in that state exceeding the surplus in Washington. The deficiency in the grant as a whole has always existed, so that under the Forest Reserve rule all the withdrawals in first indemnity were invalid, and the company may have compensation for them. This is true even if mineral and unsurveyed lands, as well as lands actually available, be counted. [712]

The statements show that the company has received patents for 1,191.59 acres within second indemnity in Washington. I must regard these lands as within the same category as lands erroneously patented under the 1864 grant. The company may keep them and they should be charged to the grant.

I believe that any incidental questions not specifically mentioned fall within the rulings under the other grant.

Findings and Conclusions.

The order of reference directs me to report to Your Honor findings of fact and conclusions of law. Counsel evidently interpret that direction as calling for formal findings and conclusions because they have filed with me numerous requests. I shall, therefore, so treat the order. I wish it to be distinctly understood, however, that if anything in these findings or conclusions seems to be, because of their necessary brevity or otherwise, in conflict with or in modification of anything said in the body of the report, it is not intended. I wish them interpreted with reference to the extended discussion of the several questions.

As each of the subjects discussed by counsel and covered in the body of the report herewith transmitted is to a great degree separate and distinct from all others, I have thought it wise so far to depart from the general practice as to state the findings, followed by the conclusions, on each subject. This course saves much repetition and puts in concrete form the findings and conclusions on each subject. References are to pages of the report: [713]

Grant of July 2, 1864.

I.

Portage Conflict (page 725.)

The facts are:

(a) From Ashland, Wisconsin, to Superior, Wisconsin, the route of Northern Pacific Railroad Company, as authorized by the act of July 2, 1864, is upon the line of the railroad route of Portage, Winnebago & Superior Railroad Company, to aid in the construction of which lands had been theretofore granted by the United States.

(b) As far as the routes are upon the same general line the amount of land so granted was 347,141.24 acres, indicated as Area A upon Govt. Exhibit 76.

(c) The route of Northern Pacific Railroad Company is not upon the same general line as the portions of the route of said Portage Company to aid in the construction of which Areas B and C, shown on said exhibit, were granted.

The conclusions are:

(a) The quantity of 347,141.24 acres should be deducted from the amount of lands granted by the act, and the lands selected in lieu thereof should be charged to the grant as lands erroneously patented.

(b) No deduction should be made on account of Areas B and C.

II.

Montana Place Error (page 729.)

The fact is:

Through error in survey certain odd-numbered sections in place limits in Montana contain more than 640 acres, the excess aggregating 5,435.46 acres. [714]

The conclusion is:

This quantity should be charged to the grant as lands erroneously patented.

III.

Lieu Selections (page 732.)

The facts are:

Under the act of July 1, 1898, and other acts for the relief of settlers, defendants selected 38,485.23 acres in indemnity limits in lieu of lands relinquished. The lieu selection rights by virtue of which such selections were made were charged to defendants.

The conclusion is:

No charge should be made by reason of such selections.

IV.

Quantity of Deficiency (page 736.)

The deficiency in the grant is 2,220,224.17 acres.

V.

"Agricultural Lands" (page 738.)

The facts are:

(a) The lands in first indemnity limits and mineral indemnity limits, respectively, within Government reservations, described in N. P. exhibits 144 and 146, for which mineral base is assigned on direct selection, are not agricultural lands in the sense that they are tillable, except those listed on page 41, which are tillable. They are not mineral lands, and are not iron or coal.

(b) The lands in first indemnity limits described in N. P. exhibit 145, for which mineral base is assigned in substitution for subsequent losses originally used, are not mineral lands, patents having issued therefor upon the original selections. They are not iron or coal. [715]

The conclusions are:

(a) The phrase "agricultural lands" as used in Section 3 of the act of July 2, 1864, is intended to be used in opposition to the phrase "mineral lands" and to include all lands not mineral, and not iron, and not coal.

(b) The lands described in N. P. exhibits 144, 145 and 146 for which mineral base is assigned are of such character as to be selectable as indemnity for mineral losses.

Note: It is not readily ascertainable which, if any, of the lands described in said exhibits are included within the limits conceded to be mineral. Any such are excepted from this conclusion.

VI.

Absaroka and Beartooth Forest (page 765.)

The facts are:

(a) 314,544.05 acres within the Absaroka and Beartooth National Forests, and within the place limits of the grant, were part of the Crow Indian Reservation when the railroad line opposite them was definitely located.

(b) Said lands were restored to the public domain in 1882, and so remained until they were withdrawn for national forests.

The conclusion is:

Said lands are subject to the same rules as may apply to other withdrawn lands, within the principle of the Forest Reserve case.

VII.

Fort Ellis Lands (page 771.)

The facts are:

(a) 3,300.82 acres within the place limits of the grant were part of Fort Ellis Military Reservation when the railroad line opposite them was definitely located. [716]

(b) The reservation was thereafter abandoned.

(c) By act of April 13, 1891, the lands were made subject to entry under the general land and mining laws of the United States.

The conclusion is:

The lands were not restored to the public domain, and therefore were not selectable by the company as indemnity.

VIII.

Northern Cheyenne Indian Reservation (page 773.)

The facts are:

(a) 52,050.93 acres within first and second indemnity limits in Montana were reserved by the United States as part of the Northern Cheyenne Indian Reservation after the line of railroad opposite them was definitely located.

(b) The lands, when so reserved, were unoccupied and unappropriated public lands.

The conclusion is:

Northern Cheyenne Indian Reservation is a Government reservation within the meaning of Section 1 of the act of June 25, 1929, and the lands therein are therefore governed by the same rules as may apply to lands within national forests and other Government reservations.

IX.

Substitution of Losses (page 777.)

The facts are:

(a) By mistake in the printed Statutes at Large the words "and within fifty miles thereof" were omitted from the provision for indemnity for mineral losses in Section 3 of the act of July 2, 1864. [717]

(b) The error was discovered in 1904.

(c) Both the company and the officials of the Department of the Interior assumed the printed statute to be correct and that therefore indemnity for mineral losses could be selected without limit of distance from the line of the road.

(d) Acting upon the supposition the company used its general losses in first indemnity; whereas, but for the mistake, it would have used them in second indemnity, reserving mineral losses for first indemnity; and therefore by this mutual mistake the company was misled to its prejudice.

(e) The Secretary of the Interior had permitted, or had refused, substitution of base for reasons which appeared to him, in the exercise of his administrative discretion, to be sufficient.

(f) After the discovery of the error in the printing of the statute, the company filed three requests for substitution. The requests were denied.

(g) After such denial, Messrs. Britton & Gray, counsel for the company at Washington, D. C., in a communication to the secretary of the Interior, expressed the view that the action of the Department was reasonable.

The conclusions are:

(a) The Secretary of the Interior, in the exercise of administrative discretion, might properly permit or refuse substitution of base, as on occasion he did. Likewise the court, in the exercise of judicial discretion, in the application of established principles of equity, may permit or refuse it.

(b) The maxim "He who seeks equity must do equity" requires that the substitution proposed by N. P. exhibit 145 be allowed. [718]

(c) The mutual mistake as to the terms of the mineral indemnity proviso was not a mistake of law, but of fact, and is therefore correctible.

(d) The mistake should be corrected by permitting the company to withdraw its assigned general losses and substitute therefor mineral losses as proposed by said exhibit.

(e) The action of the company in making its several assignments of general losses was not an election, first, because the common-law doctrine of election is not applicable to these selections, and, second, because, if it were, the election was made under a mistake of fact and is not binding.

(f) After denial by the Department of its requests for substitution the company had no remedy, and did not acquiesce in the rejection of its requests.

(g) The letter from Messrs. Britton & Gray did not amount to nor evidence any acquiescence by the company in the general principle of the right of substitution, nor amount to more than a statement by counsel to the Secretary that they would pursue the matter no further before him. It could not have been said that after that letter was written the company could make of him no further requests for substitution, and it most certainly does not affect the company's right under the principle that the plaintiff must do equity.

X.

Availability of Withdrawn Lands for Indemnity Selections (page 819.)

The facts are:

(a) On March 1, 1898, prior to the withdrawals of that date for governmental purposes, the vacant surveyed nonmineral [719] lands within the indemnity limits of the grant of July 2, 1864, were insufficient to supply the unsatisfied losses in place, and that condition obtained until after all the withdrawals for governmental purposes within those limits had been made.

(b) A withdrawal of 5,120 acres was made for forest purposes February 3, 1892, and there is no proof that the grant was then deficient.

(c) On December 31, 1935, counting withdrawn lands, whether surveyed or unsurveyed, but excluding mineral, there was an excess of approximately 24000 acres.

(d) The vacant lands in second indemnity limits in Idaho, including withdrawn lands, together with selections heretofore made in said limits, exceed the subsequent losses in that state by approximately 30,000 acres.

Note: It must be left to counsel to ascertain exact acreage in this as in other instances. So also, in general, with matters of description.

The conclusions are:

(a) What may be selected as indemnity depends upon the state of the lands sought to be selected at the moment of choice; hence, neither mineral

lands nor unsurveyed lands could be taken in satisfaction of losses. In determining, therefore, whether the lands in indemnity limits were sufficient to supply the losses, neither mineral nor unsurveyed lands should be counted.

(b) All the withdrawals listed in Govt. exhibits 110, 111, 113, to 188, both inclusive, 152A, 161A, 184A, 184AA, 184B, 110A, 111B, 188A, 188B and 188C were invalid and ineffective as against the indemnity selection rights of the defendants, except as to 3,300.82 acres of abandoned Fort Ellis lands. [720]

(c) Northern Pacific Railway Company may designate and have compensation under the act of July 25, 1929, for all such withdrawn lands, with the exception just noted, to the extent of the deficiency as found, save that in second indemnity limits in Idaho it may not select, including valid selections heretofore made in said limits, more than the quantity of its subsequent losses in Idaho, and save that it may not select lands conceded to be mineral.

(d) In designating land for which it claims compensation, the railway need not specify a particular loss in place for each indemnity tract for which compensation is claimed.

XI.

Lands Patented to Homesteaders after Withdrawal.

The fact is:

3,710.31 acres within withdrawn lands were entered under the general homestead laws or by other

filings after withdrawal and prior to June 5, 1924, and patents therefor were subsequently issued to the applicants.

The conclusion is:

Since the withdrawals were invalid, the company should have compensation as though the lands remained in their withdrawn status and had not been patented. The principle applied to the Northern Cheyenne Indian allotments applies here. What the government did with the lands after they had been placed, by withdrawal, beyond the reach of the company, can have no effect whatever upon the company's rights.

Grant of May 31, 1870.

I.

Authorization of Second Indemnity Limits

(page 842.)

It is concluded the Joint Resolution of May 31, 1870, authorized the laying down of second indemnity limits in Washington in event of deficiency at final location. [721]

II.

Tacoma Overlap (page 846.)

The facts are:

637,580.99 acres in odd-numbered sections within the place limits of the grant of 1870 for the line from Portland to Puget Sound, southeast of Tacoma, were comprehended by the place limits of the grant of 1864 for the line from Pasco to Puget

Sound. Both lines were definitely located and were constructed.

The conclusion is:

The company is not entitled to indemnity for the lands which it got by the 1864 grant.

III.

Lieu selections (page 865.)

The fact is:

Under the act of July 1, 1898, and other acts for the relief of settlers, defendants selected 8,568.29 acres in indemnity limits in lieu of lands relinquished. The lieu selection rights by virtue of which such selections were made were charged to the grant.

The conclusion is:

No charge should be made by reason of such selections.

IV.

Eighty Acres (page 865.)

The fact is:

Eighty acres of first indemnity land outside Government reservations remain unsurveyed.

The conclusion is:

The land should be patented to the company and charged to the grant. [722]

V.

Quantity of Deficiency (page 867.)

The deficiency in the grant is 572,724.17 acres.

VI.

Availability of Withdrawn Lands for Indemnity Selections (page 867.)

The facts are:

(a) On final location in the Territory of Washington the vacant lands within the first indemnity limits were sufficient to supply the place losses.

(b) In 1906 second indemnity limits were laid down in Washington and 1,191.59 acres therein have been patented to the company. 200 acres additional have been selected.

(c) On final location in the grant as a whole the vacant lands within the indemnity limits of the grant were insufficient to supply the place losses, and that condition has since obtained.

The conclusions are:

(a) The second indemnity limits in Washington should not have been laid down, and the lands therein were never rightfully available for selection.

(b) 1,191.59 acres in second indemnity limits patented to the company should be retained by it and charged to the grant, the same principle applying as in the case of other lands erroneously patented. Selections of 200 acres of additional therein should be cancelled.

(c) All withdrawals in second indemnity limits are valid and defendants cannot have compensation for any thereof.

(d) All withdrawals in first indemnity limits listed in Govt. exhibits 223 to 227, both inclusive,

were invalid and in- [723] effective as against the indemnity selection rights of the defendants.

(e) Northern Pacific Railway Company may designate and have compensation under the act of July 25, 1929, for all withdrawn lands in first indemnity limits, except such as are conceded to be mineral, to apply upon the deficiency as found.

Both Grants.

I.

Lands Conceded to be Mineral

The facts are:

The following lands are mineral (other than coal and iron) and are excepted from the grant:

a. Those lands in the place limits in Montana listed and described on the schedule offered by the defendants and appearing on pages 587-589 of the transcript, aggregating 11,254.73 acres;

b. Those lands in the place limits in Idaho listed and described on the schedule offered by the defendants and appearing on pages 590-591 of the transcript, aggregating 21,208.07 acres;

c. Those lands in the place limits in Washington listed and described on the schedule offered by the defendants and appearing on pages 592-593 of the transcript, aggregating 3,210.30 acres;

d. Those lands in the second indemnity belt in Montana listed and described on the schedule offered by the defendants and appearing on page 598 of the transcript, aggregating 7,265.56 acres;

e. Those lands in the second indemnity belt in Idaho, aggregating 2,701.00 acres, and described as follows: [724]

	Sec.	T. N.	R. W.	Acres
"All	1	42	2	637.76
NE¼, N½ NW¼, SE¼ NW¼	11	42	2	280.00
All	31	43	2	623.24
S½ SE¼, NE¼ SE¼, SW¼, S½, NW¼, NW¼ NW¼	33	43	2	400.00
S½, NE¼, S½ NW¼, NE¼ NW¼	35	43	2	600.00
N½ NW¼, SE¼ NW¼, NW¼ NE¼	35	43	3	160.00

f. Those lands in the first indemnity belt in Idaho, aggregating 5,602.12 acres, and described as follows:

		N.	W.	
All	1	64	5	640.00
"	5	"	"	640.00
"	7	"	"	320.00
W½	9	"	"	320.00
E½	13	"	"	320.00
All	17	"	"	640.00
"	19	"	"	237.96
"	21	"	"	640.00
W½	27	"	"	320.00
All	29	"	"	640.00
"	31	"	"	244.16
"	33	"	"	640.00

g. Those lands listed and described on the schedule offered by the defendants, beginning on page 798 of the transcript, aggregating 92,276.70 acres;

h. Those lands listed and described on the schedule offered by defendants and appearing on page 890 of the transcript, aggregating 1,211.79 acres in the place limits of Washington under the grant of July 2, 1864, and 242.78 acres in place limits of Washington under the grant of 1870;

i. Those lands listed on the schedule offered by the defendants and appearing on page 1452 of the transcript, aggregating 1,035.41 acres.

Note: The lands mentioned in a, b, c, d, g, h and i were conceded by both sides during the taking of the testimony to be mineral. Those described in e and f were determined to be mineral by correspondence. I have filed as Govt. exhibit 302 a letter from Judge Biggs to me, dated May 24, 1937, enclosing copies of the [725] correspondence touching these items. Since the descriptions appear in part at various places in the transcript and in part have been determined by correspondence, and since item g, as it appears in the transcript does not show the acreage, I suggest that the parties file a stipulation describing the lands conceded to be mineral. Upon their doing so, this finding will be deemed to refer to the lands described in such stipulation.

II.

Lands Listed or Selected but not Patented.

The facts are:

The place lands described in N. P. exhibits 149-158, both inclusive, and the indemnity lands described in said exhibits for which nonmineral losses are assigned, are nonmineral lands. The indemnity lands described in said exhibits, for which mineral losses are assigned, are nonmineral lands, and are not iron or coal.

The conclusion is:

The railway company is entitled to patent for the lands described in said exhibits.

Note: Excepted from this conclusion are any of such lands as are conceded to be mineral.

The order also directs the special master to report recommendations for an order or decree. Counsel have not advised me what is expected in this respect. Indeed, they did not refer to the subject either in oral argument or in briefs. Still the direction is there, and I suppose I should pay some attention to it. The copy of the special statute of appeal in this case (I have not the date before me) uses the phrase "order or decree." So likewise is the direction in the reference. In equity practice the word "order" has always, and does still, refer to those short and [726] informal matters which are called to the court's attention in the progress of the cause. Formerly motions for such orders were made orally. They still are as to some matters, but are more usually in writing. The word "decree" in equity practice has always, and still does, refer to the more formal and solemn adjudication of the rights of the parties. This is as true of an interlocutory as of a final decree. Concrete to the case before us, I presume the word "order", as used in both the statute and the direction of reference, refers to Your Honor's action in sustaining or overruling exceptions which may be taken to this report, and to any other directions concerning it. The word "decree" obviously refers to an interlocutory decree to be made at this time. I suppose that decree should finally and fully adjudicate the rights of the parties in this case. It should, in form as well as in substance, wind up

this litigation and determine, once and for all, the respective rights of the government and the railroad under the grants of the company. It should, of course, leave open the question of any determination which may be necessary upon the subject of compensation to the company for lands in the governmental reserves retained by the United States. It is very closely analogous to a decree for the plaintiff in a patent right case, that decree leaving open only the subject of accounting for profits and damages for the infringement. I do not see that I am able to make any other suggestion on this point that would be helpful to Your Honor or to counsel. [727]

I certify that the five bound typewritten volumes of testimony, transmitted herewith, comprising 1481 pages, constitute a full, true and correct transcript of the testimony taken under the amended order of reference dated the 21st day of April, 1936, at Washington, D. C., April 28 to May 2, 1936, and at Spokane, Washington, June 15 to June 20, 1936, September 2 to 5, 1936, and January 27 to February 15, 1937, and that the exhibits transmitted herewith, being Government exhibits 66 to 301, both inclusive, and Northern Pacific exhibits 131 to 167A, both inclusive, and indexed in said volumes, are the exhibits admitted in evidence. Govt. exhibits 302 is the one stipulated by correspondence to which reference is made above.

Accompanying the exhibits in a separate envelope, are numerous documents, and a map, not introduced as exhibits, but submitted to me for con-

venience of reference. Also in a separate envelope, which I have marked N. P. exhibit 168, are the maps submitted by the railway company in support of its claim that lands for which it tendered mineral base in substitution are not iron lands, and correspondence pertaining thereto.

F. H. GRAVES,
Special Master.

[Endorsed]: Filed July 26, 1937. [728]

[Title of District Court and Cause.]

EXCEPTIONS OF DEFENDANTS, NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION, AND NORTHWESTERN IMPROVEMENT COMPANY, A CORPORATION.

Now comes the defendants Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation, and take the following exceptions to the report of the Special Master, Honorable Frank H. Graves, filed with the clerk of this Court on July 26, 1937;

I.

The above named defendants except (a) to the finding (Report, pp. 143,30) that the route of the

Northern Pacific Railroad Company between Ashland, Wisconsin and Superior, Wisconsin, is upon the line of the railroad route of the Portage, Winnebago & Superior Railroad Company; (b) to the finding (Report, p. 143) that as far as the routes are upon the same general line the amount of land so granted to Portage, Winnebago & Superior Railroad Company was 347,141.24 acres; (c) to the conclusion (Report, pp. 143,30) that 347,141.24 acres should be deducted from the area of the grant to the Northern Pacific Railroad Company and that the lands selected in lieu thereof should be charged to the grant as lands erroneously patented; (d) to the finding (Report, p. 36) that the deficiency under the grant [729] of July 2, 1864 is 2,220,224.17 acres or any area less than 2,567,365.41 acres; (e) to the finding (Report, p. 37) that the unsatisfied losses in the hands of defendant Northern Pacific Railway Company are 2,269,707.75 acres or any quantity less than 2,616,848.99 acres.

II.

These defendants except (a) to the finding (Report, p. 152) that the deficiency in the grant of May 31, 1870 is only 572,724.17 acres or any area less than 1,218,953.46 acres; (b) to the finding (Report, p. 152) that on final location in the Territory of Washington of the line of railroad between Portland, Oregon and Tacoma, Washington the vacant lands within the first indemnity limits in Washington were sufficient to supply the place losses of the

grant for said line in said Territory; (c) to the conclusion (Report, p. 152) that the second indemnity limits in Washington should not have been laid down and that the lands therein were never rightfully available for selection; (d) to the conclusion (Report, p. 152) that all withdrawals for national forest reserves in said second indemnity limits are valid and that defendants can not have compensation for any of said lands; (e) to the conclusion (Report, p. 151) that the company is not entitled to indemnity under the grant of May 31, 1870 for the lands in the Tacoma Overlap which it got by the grant of July 2, 1864; (f) to the conclusion (Report, p. 152) that selections of 200 acres additional in second indemnity limits in Washington should be cancelled; (g) to the conclusion (Report, p. 138) that the lands within the Tacoma Overlap cannot be regarded as lost to the grant of May 31, 1870 and that indemnity may not be had for them; (h) to the finding (Report, p. 137) that had the Northern Pacific supposed it was entitled to indemnity under the grant of May 31, 1870 for the lands in Tacoma Overlap because of the prior grant, it would not have laid by through all the years and never [730] asserted the right; (i) to the finding (Report, p. 140) that the deficiency under the grant of May 31, 1870, is no more than 581,292.47 acres or any area less than 1,218,953.46 acres and that the unsatisfied losses in the hands of defendant Northern Pacific Railway Company are no more than 580,434.12 acres or any quantity less than 1,218,-

015.11 acres; (j) to the conclusion (Report, p. 141) that the condition for laying down second indemnity limits in Washington not having happened, the lands within those limits may not be used in reduction of the deficiency, that said lands were never rightfully available for selection, that the forest withdrawals therein are valid, and that the company cannot have compensation for any of said lands.

III.

These defendants except to the conclusion (Report, p. 10) that the losses to be satisfied within second indemnity limits of a particular State or Territory are restricted to those originating within the same State or Territory.

IV.

These defendants except to the conclusion (Report, pp. 108, 109) that the Government may reserve or appropriate to its own uses lands in the indemnity limits so long as that which remains is sufficient to meet all unsatisfied losses.

L. B. daPONTE
F. J. McKEVITT
D. R. FROST
Solicitors for defendants, Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation.

[Endorsed]: Filed Aug. 9, 1937. [731]

[Title of District Court and Cause.]

SUPPLEMENTAL EXCEPTIONS OF DEFENDANTS.

Now comes the defendants, Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company, and in addition to the exceptions filed with the Clerk August 9, 1937, take the following exceptions to the report of the Special Master, Honorable Frank H. Graves, filed with the Clerk of this Court on July 26, 1937:

I.

The above named defendants except to the omission on page 105 of the report in the enumeration of withdrawals in first indemnity limits in Washington of that certain withdrawal of 799.95 acres of said Washington first indemnity lands for forest purposes on October 10, 1924, said area being described in detail in Northern Pacific Railway Exhibit 144 on page 10 thereof. Plaintiff in its exhibits showing the areas of lands withdrawn on December 31, 1935 included said 799.95 acres in the total area of withdrawals.

II.

The above named defendants except (a) to the finding (Report, p. 106) that 3300.82 acres of Fort Ellis lands are closed to selection; and (b) to the finding (Report, p. 106) that 92,276.70 acres of withdrawn lands are conceded to be mineral and are hence ineligible; and (c) to the finding (Report,

p. 106) that these deductions bring the total down to [732] about 2,244,000 acres. Said areas of 3300.82 acres of Fort Ellis lands and of 92,276.70 acres of conceded mineral lands are not described in any of the plaintiff's exhibits enumerated on pages 103, 104 and 105 of the report, and hence said areas are not included in any of the totals shown on said pages 103, 104 and 105.

L. B. daPONTE
D. R. FROST
F. J. McKEVITT
Solicitors for defendants, Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company.

[Endorsed]: Filed Aug. 11, 1937. [733]

[Title of District Court and Cause.]

EXCEPTIONS OF THE UNITED STATES TO THE REPORT OF THE SPECIAL MASTER FILED ON JULY 26, 1937.

[734]

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[735]

[Title of District Court and Cause.]

EXCEPTIONS TO THE MASTER'S REPORT

Comes now the plaintiff, and without waiving any of its exceptions to the former Report of the Master herein, or to the Order of the Court thereon, files the following exceptions to the report of the Special Master filed on July 26, 1937. All exceptions are to be deemed taken not only to the finding or conclusion specified, but to all findings and conclusions of like import in the general body of the report. (The transcript of evidence is referred to by the letters "Tr." followed by the page number. The Master's Report is referred to by the letter "p." followed by the page number.)

Portage Conflict

Exception No. 1.

The plaintiff excepts to the Master's finding of fact ((b) on page 143) of his report that "As far as the routes are upon the same general line the amount of land so granted was 347,141.24 acres, in- [736] dicated as Area A upon Govt. Exhibit 76" and to the Master's finding to the same effect in the body of his report (pp. 27-30) for the following reasons:

(a) The uncontradicted evidence is that 417,400.66 acres, as shown on Government Exhibit 76 and by the testimony of the witness Barber (Tr. 102) is the amount of land in place within the overlapping limits of the grant made by the Act of May 5, 1864, to Wisconsin for the benefit of the Portage, Winnebago & Superior

Railroad Company, and the grant made by the Act of July 2, 1864, to the Northern Pacific Railroad Company for that portion of its line from Ashland to Superior which this Court holds is upon the same general line of the route of the Portage Company and that this overlapping area of 417,400.66 acres should be deducted.

(b) The Master in his former report (p. 92) approved by the Court, held that no "title within the overlapping of these two roads ever passed to the Northern Pacific" and the Government contends the Master should have deducted the overlapping Areas of A, B and C, aggregating 417,400.66 acres.

Exception No. II.

The plaintiff excepts to the Master's finding of fact ((c) on page 143) of his report that "The route of Northern Pacific Railroad Company is not upon the same general line as the portions of the route of said Portage company to aid in the construction of which Areas B and C, shown on said exhibit, were granted" and to the Master's finding to the same effect in the body of the report (pp. 27-30), for the reason that this Court held in its former decree in this suit that [737] the Northern Pacific earned nothing for its line from Superior to Ashland in so far as the place limits of the portion of its road overlap or conflict with the place limits of the prior grant to the Portage Company. The

Areas B and C are within the place limits opposite the line from Ashland to Superior and within the place limits of the prior grant to the Portage Company.

Exception No. III.

The plaintiff excepts to the Master's conclusion of law ((a) on page 143) of his report that "The quantity of 347,141.24 acres should be deducted from the amount of lands granted by the act, and the lands selected in lieu thereof should be charged to the grant as lands erroneously patented," and to the Master's conclusion to the same effect in the body of the report (pp. 27-30), for the reason that the said conclusions are erroneous in that:

(a) The Court should have held that the deduction should be 417,400.66 acres, being the amount of overlapping lands within the place limits of that portion of the route of the Northern Pacific between Ashland and Superior and within the place limits of the prior grant to the Portage Company.

(b) The Court should have further held that since the Company acquired patents to these lands by the use of said alleged base (Exhibit R to the amended bill and Government Exhibits 76 and 289, Tr. 1409-1410), treating it as non-mineral base, although the overlapping area was not a loss to the grant, it is incumbent upon the Company now to assign valid, unused, non-mineral base for the lands so patented. The Master should have made his computation or findings as

though, and to the same effect as if, the non-mineral unused losses of the Company had been reduced to that extent.

(c) Mineral base cannot be used for the reason that the Company offered no evidence as to the non-coal, non-iron or agricultural [738] Character of these patented lands and there is no evidence in the record as to their character.

(d) The plaintiff did make an issue of the character of the losses thus required (See report, p. 30; plaintiff's brief, pp. 12-14), notwithstanding the statement of the Master on page 117 of his report.

Exception No. IV.

The plaintiff excepts to the Master's conclusion of law ((b) on page 143) of his report that "No deduction should be made on account of Area B and C" and to the Master's conclusion to the same effect in the body of the report (pp. 29-30), for the reason that said ruling is erroneous as set forth above in connection with Exception No. III to the Master's conclusion of law (a) on page 143.

Exception No. V.

The plaintiff excepts to the failure of the Master to find as a fact its request (2) for findings of fact as follows:

That the acreage of said three Areas A, B and C aggregating 417,400.66 acres in odd-numbered sections is the amount of land in place within the overlapping limits of the grant made by the Act of May 5, 1864, to Wisconsin for the

> benefit of the Portage, Winnebago & Superior Company, and the grant made by the Act of July 2, 1864 to the Northern Pacific for that portion of its line from Ashland to Superior.

for the reason that the facts stated in said requested findings are established by the uncontradicted evidence of the witness Wansleben (Tr. 63 to 69, describing Exhibit 76) and of the Witness Barber (Tr. 102).

Quantity of Deficiency

Exception No. VI.

The plaintiff excepts to the finding of the Master (p. 144) that "The deficiency in the grant is 2,220,224.17 acres" and to the like conclusion of the Master at page 36 of the report, for the reason said finding is erroneous in that it is based upon a deduction of only 347,141.24 acres on account of the overlapping of the primary limits of the Northern Pacific grant with the Portage grant whereas the de- [739] duction on account of such overlapping should have been 417,400.66 acres, for the reasons stated in Exceptions Nos. I and III.

Agricultural Lands

Exception No. VII.

The plaintiff excepts to the failure of the Master to find as requested by its forty-second request for findings of fact:

> That each and every tract of land described in Government Exhibits 237, 244 and 248 and which lands the Railway Company asks to se-

lect as indemnity for mineral loss as set forth in Northern Pacific Exhibits 144 and 146 are not agricultural lands, except those tracts listed in Columns 2, 3 and 4 of said Government Exhibits 237, 244 and 248.

The uncontradicted evidence covering pages 1106 to 1379 of the Record is to this effect. If the Court is of the opinion that the Master's finding of fact (a) on page 144 of his report is a finding in substance as above requested, then this exception becomes immaterial.

Exception No. VIII.

The plaintiff excepts to the Master's finding of fact (p. 45) that "From the beginning of the administration of this grant it was consistently the understanding of Land Commissioners and Secretaries of the Interior that the phrase (agricultural lands) was one of classification and was intended to mean, and it was held did mean, all lands not mineral in character", for the reason that:

(a) This finding is contrary to the evidence introduced by the Company in the form of a letter from E. C. Finney, First Assistant Secretary of the Interior, dated May 6, 1925 (Tr. 1472-1476), in which the Assistant Secretary stated: "I find no specific ruling of the department on this point".

(b) There is no evidence from which the Master could find that the phrase was understood to be one of classification, nor was there any ruling by the Commissioner of the General

Land Office or the Secretary of the Interior that it meant all lands not mineral in character. [740]

Exception No. IX.

The plaintiff excepts to the Master's finding of fact ((b) on page 144) that "The lands in first indemnity limits described in N. P. exhibit 145 (the Master probably means N. P. Exhibit 167), for which mineral base is assigned in substitution for subsequent losses originally used, are not mineral lands, patents having issued therefor upon the original selections. They are not iron or coal", and to the Master's finding to the same effect in the body of the report (pp. 58-59 and 97 to 101). The plaintiff excepts to the finding that these lands are not iron or coal for the reasons that:

(a) The sole evidence as to their coal character is the evidence of defendants' witness Schwarm, found on pages 634, 637 and 689 to 703 of the Transcript. The plaintiff objected and excepted to this evidence (Tr. 701-2) on the ground that the witness could not testify as to the contents of the geological reports without producing them and on the further ground that he was not an expert. The plaintiff relies upon these objections and exceptions.

(b) Even if the evidence of the witness Schwarm were competent, it has no probative value.

(c) As to the evidence of the iron character of these lands the only witness who testified as

to their iron character was the witness Schwarm (Tr. 690) and the Master finds on page 98 of his report that this evidence was insufficient to prove their non-iron character. The Master reaches his finding as to their non-iron character by examining certain publications listed on pages 98 to 101 of the report which were not offered in evidence, of which the Master could not take judicial notice, and which, in any event, do not show the non-iron character of these lands. [741]

Exception No. X.

The plaintiff excepts to the Master's conclusion of law ((a) on page 145) of his report that "The phrase 'agricultural lands' as used in section 3 of the Act of July 2, 1864, is intended to be used in opposition to the phrase, 'mineral lands' and to include all lands not mineral, and not iron, and not coal", and to the Master's conclusion to the same effect in the body of the report (p. 50). Said ruling is erroneous and the same is contrary to law for the reason that the proper meaning of the words "agricultural lands" in said section is the ordinary and accepted meaning of those words, that is, lands which are tillable or capable of cultivation.

Exception No. XI.

The plaintiff excepts to the conclusion of law ((b) of the Master on page 145) of his report that "The lands described in N. P. exhibits 144, 145 and 146 for which mineral base is assigned are of such

character as to be selectable as indemnity for mineral losses", and to the Master's conclusion to the same effect in the body of the report (pp. 58, 59, 97-101). Said conclusion is erroneous for the reason that the Master has found (a) p. 144) that all except 10,803.17 acres of the said land described in said Exhibits 144 and 146 "are not agricultural lands in the sense that they are tillable". No evidence was introduced to show that the patented lands in N. P. Exhibit 167 (mistakenly referred to as 145) on which mineral base was offered in substitution, were agricultural lands, and, as pointed out in Exception No. IX, there was no competent evidence tending to show their non-coal or non-iron character, either now, or at date of selection or patent. The Master was in error in construing the words "agricultural lands" as meaning "non-mineral lands".

Absaroka and Beartooth Forests

Exception No. XII.

The plaintiff excepts to the conclusion of law of the Master on [742] page 145 of his report that "Said lands are subject to the same rules as may apply to other withdrawn lands, within the principle of the Forest Reserve case", and his conclusion of law on page 64 of his report that these "lands became subject to selection when they ceased to be a part of the Crow Indian Reservation, and are as much within the rule of the Forest Reserve case as any other indemnity lands." Said conclusions are erroneous for the reason that:

(a) These lands were not comprehended in the grant but they were reserved lands at the time the Company definitely located its road through them and had been in that status for thirteen years.

(b) The Government had the right when it purchased them from the Indians to deal with them as any other public lands not covered by the grant, as conceded by the Master, page 62 of his report. His holding that a vested right arose in favor of the Company is unwarranted. After the lands were purchased from the Indians they did not occupy the same status as if they had never been reserved lands.

(c) No consideration moved from the Company to the Government in purchasing them.

Northern Cheyenne Indian Reservation

Exception No. XIII.

The plaintiff excepts to the Master's finding of fact ((b) on page 146) of his report that "The lands, when so reserved, were unoccupied and unappropriated public lands", for the reason there is no evidence to support this finding.

Exception No. XIV.

The plaintiff excepts to the Master's failure to find as requested in its request for finding of fact No. 33 as follows:

That there is no evidence from which the Master can find that these lands were unappropriated or unoccupied lands at the time the

reservation was created in 1900 or at any other time. [743]

Exception No. XV.

The plaintiff excepts to the Master's conclusion of law on page 146 of his report that "Northern Cheyenne Indian Reservation is a Government reservation within the meaning of Section 1 of the Act of June 25, 1929, and the lands therein are therefore governed by the same rules as may apply to lands within national forests and other Government reservations", for the said conclusion is erroneous for the following reasons:

(a) This reservation was not a Government reservation within the meaning of the Act of June 25, 1929, which means a reservation owned by the Government.

(b) As set forth in the Master's report, page 66, Congress by the Act of June 3, 1926, enacted that this Indian reservation "be and the same is hereby, declared to be the property of said Indians", and directed the allotment of the agricultural and grazing lands to the Indians. At that time there were approximately 1,408 Indians on the reservation which contained 489.500 acres (Senate Report No. 638, dated April 19, 1926, 69th Congress, 1st Session). Pursuant to said Act 1,547 allotments aggregating 233,120 acres were made in severalty to said Indians (Annual Report of Commissioner of Indian Affairs for 1932, p. 28).

(c) At the date of the passage of the Act of 1929 these lands did not belong to the United States, but they were the property of the Northern Cheyenne Indians numbering about 1,500 who were living on these lands. [744]

Substitution of Base

Exception No. XVI.

The plaintiff excepts to the Master's finding, both in the formal finding ((b) p. 147), and in the body of the report (pp. 77-79) to the same effect, that "the error (in the printed statute) was discovered in 1904" and that "for something over forty years all concerned understood the published statute to be as enacted and enrolled". (The formal finding implies that the Company lacked knowledge of notice of the correct provisions of the statute referred to prior to 1904).

For grounds of such exception, plaintiff says:

(a) That said finding is not supported by any evidence or any fact before the Court.

(b) That said finding is contrary to the undisputed evidence and admitted fact that from very early days the Company had a correct copy of the statute in its possession (testimony of witness Schwarm, Tr. 632).

(c) That said finding is contrary to the admitted fact that the mortgages executed by the Company May 1, 1879 and September 1, 1879 (Exhibits G and H attached to the amended bill of complaint) recite the exact language of

the statute, including the words "and within fifty miles thereof."

(d) That said finding is contrary to the undisputed facts disclosed by the testimony of the witness Schwarm (Tr. 942 to 943a) that the patented lands in respect to which substitution of base is now being sought, were originally selected by the Company between 1883 and 1897, the bulk of them being selected in 1883, 1885 and 1887, when the circumstances and terms of the grant were presumably well known to and fresh in the minds of the Company's agents.

(e) That said finding is contrary to facts of which the Court may take judicial notice, including the facts that the statute was [745] enacted at the solicitation of the incorporators of the Company, and that the Congressional proceedings (Congressional Globe, July 1, 1864, 38th Cong., 1st Sess., p. 3459, p. 3479; Cong. Globe, April 20, 1870, 41st Cong., 2d Sess., p. 2842) disclosed its true language.

(f) That said finding is contrary to the rule that the Company was, as a matter of law, chargeable with knowledge and notice of the terms of the statute.

(g) That said finding is contrary to the other findings of the Master:

1. That "in the very early days the company had a correct copy of the statute" (p. 78); and

2. That there is no evidence of what knowledge or lack of knowledge the Company

had, as disclosed by the Master's recital that "as the years went by, those having to do with the grant left the employ of the Company, and are all now dead", (p. 78), and "Of course, what form the copy Mr. Schwarm refers to was in, where it was kept, what, if any, use was made of it at the time, is not disclosed by the evidence and after all the years could not possibly be shown". (p. 79)

Exception No. XVII.

The plaintiff excepts to the Master's finding, both in the formal findings ((c) p. 147), and in the body of the report (pp. 77, 79 and 80) to the same effect, that "Both the company and the officials of the Department of the Interior assumed the printed statute to be correct and that therefore indemnity for mineral losses could be selected without limit of distance from the line of the road."

For grounds of such exception, plaintiff says:

(a) The finding that the Company assumed the printed statute to be correct implies that this assumption was based on lack of knowledge or notice and not upon inadvertence, and therefore said [746] finding is in error for all the reasons set out as grounds for exception to the finding of fact (b), p. 147, in the preceding numbered exception.

(b) The finding that the Company assumed that indemnity for mineral losses could be selected without limit of distance is not supported by any evidence or any fact before the Court.

(c) The finding that the Company assumed that indemnity for mineral losses could be selected without limit of distance is in disregard of the fact, which the Master should have found, that had the statute been enacted as printed, its language or a reasonable construction thereof, would not warrant any assumption that mineral losses could be selected without limit of distance, or within the second indemnity limits.

(d) The finding that the Company assumed that indemnity for mineral losses could be selected without limit of distance is contrary to the other findings of the Master in the body of the report to the effect that no evidence established that any such assumption was in fact made, as disclosed by the Master's recital (p. 79) that "In the nature of things, of course, no direct evidence can be had, as there is no person living who could know the fact".

Exception No. XVIII.

The plaintiff excepts to the Master's finding, both in the formal findings ((d) p. 147), and in the body of the report (pp. 79 and 80) to the same effect, that "acting upon that supposition the company used its general losses in first indemnity; whereas, but for the mistake, it would have used them in second indemnity, reserving mineral losses for first indemnity; and therefore by this mutual mistake the company was misled to its prejudice."

For grounds of such exception, plaintiff says:

(a) That the finding that the Company acted upon the supposition mentioned in using gen-

eral losses in first indemnity limits is not supported by any evidence or any fact before the Court. [747]

(b) That the finding that the Company so acted is contrary to and disproven by the undisputed facts that when such general losses were used by the Company, settlers were then locating upon first indemnity lands (statement of the Master, Tr. 935); and that mineral losses were small and thought to be small by the Company, which was then asserting its claims in the case of Barden v. Northern Pacific Railroad Company, 154 U. S. 288, and which facts disclose that there can be no reason for inferring that, but for any error in printing, or misapprehension in regard thereto, the Company would have acted otherwise than it did in making selections and assigning base, or would have been advantaged by so doing.

(c) That the finding that the Company so acted upon such supposition is contrary to the other findings of the Master in the body of the report which disclose that whether, at the time of such action, it would have been to the advantage of the Company to use subsequent losses in second indemnity limits, reserving mineral losses for first indemnity limits, or whether the Company would have considered such action advantageous at the time, is a matter purely of speculation, as disclosed by the Master's recitals that "The company may have thought

that its mineral losses would be so small that there would be enough land left in first indemnity to satisfy them when they were established" (p. 89), that it was prosecuting its contentions in the Barden case until 1894 (p. 90), that at the time in question "there were no ascertained mineral losses" (p. 78), and that "There is no evidence that the first indemnity limits were being settled up so fast that the company had to rush its subsequent losses in there to get ahead of settlers" (p. 90), (which implies that there is also no evidence that they were not being so settled up).

(d) That the finding that the Company was misled to its prejudice (and that it was in fact prejudiced by the manner in which its selections were made) is not supported by any evidence or any fact before the Court. [748]

(e) That the finding that the Company was misled to its prejudice, and was so prejudiced, is contrary to the evidence, which discloses that, because of the incoming settlers, and the other facts set out in paragraph (b) of this Exception, it was fully as advantageous for the Company to select indemnity lands as rapidly as possible using the losses then available, as to have withheld such losses for second indemnity lands.

(f) That the finding that the Company was misled to its prejudice, and was so prejudiced, is contrary to the specific findings in the body

of the Master's report which are stated and quoted above in ground numbered (c) for this exception, and which discloses that it is a matter purely of speculation whether the Company did in fact suffer any detriment.

Exception No. XIX.

The plaintiff excepts to the findings of the Master, both in the formal findings ((e) p. 147), and in the body of the report (p. 73) to the same effect, that "The Secretary of the Interior had permitted . . . substitution of base for reasons which appeared to him, in the exercise of his administrative discretion, to be sufficient", and for ground of such exception says that the facts before the Court show that the only instances where substitution of base was permitted were of the two classes mentioned by the Master (p. 71), namely, "where the selection list was still pending" or "where it (the Department of the Interior) had itself induced an error."

Exception No. XX.

The plaintiff excepts to the Master's conclusion ((a) p. 147), both as stated in the formal conclusions and in the body of the report (pp. 71 and 74) to the same effect, that "The Secretary of the Interior, in the exercise of administrative discretion, might properly permit or refuse substitution of base, as on occasion he did."

For grounds of such exception, plaintiff says.

[749]

(a) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as hereinbefore in these exceptions specified.

(b) The findings of fact as made do not support such conclusion as a matter of law.

(c) The said conclusion that the Secretary of the Interior might properly permit a substitution of base is erroneous and contrary to law in that:

1. The Secretary of the Interior was not and never has been vested with authority to permit substitution of base.

2. Permission to substitute base, as sought by the Company in this case and permitted by the report of the Master, is not authorized by the provisions of the grant, but is contrary thereto.

3. The regulation of the Department of the Interior requiring assignment of base in the selection of indemnity lands (4 L. D. 90, Circular of August 4, 1885) having the force and effect of law, operated to deny any right or authority for substitution or rearrangement of losses after selection and acquisition of indemnity lands by the Company.

Exception No. XXI.

The plaintiff excepts to the conclusion of the Master, both as stated in the formal conclusions ((a) p. 147), and in the body of the report (p. 74)

to the same effect, that "Likewise the court, in the exercise of judicial discretion, in the application of established principles of equity, may permit or refuse (substitution of base)."

For grounds of such exception, plaintiff says:

(a) The Court is not authorized by the Constitution or laws of the United States or otherwise to permit substitution of base [750] as allowed by the Master.

(b) The said conclusion is contrary to law.

(c) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as hereinbefore in these exceptions specified.

(d) The findings of fact as made do not support such conclusion as a matter of law.

(e) If the Secretary of the Interior ever had any power to grant or deny substitution of base, his participation in the making of any withdrawal that would be invalidated by the granting of substitution of base was, in itself, an exercise of such power in denial of substitution. The withdrawals referred to are listed on pages 103 to 105 of the Master's report.

(f) The Court is not charged with the duty of undertaking a rearrangement or substitution of base for the purpose of awarding the Company the maximum calculable percentage of the acreage originally within the place limits of the grant, nor is the same, or any part thereof, within the jurisdiction of this Court.

(g) The Court is not vested with any administrative or other power to adjust the grant in the sense in which that term is used by the Master in that part of his report where he recites (p. 74); "I am now of the opinion, therefore, that such adjustment of the grant is committed to this court, with the same power and authority possessed by the Secretary under the previous statute directing him to adjust," as is more particularly specified in Exception No. XXXIX.

(h) There are no allegations in the pleadings warranting or justifying the relief described in this conclusion. [751]

Exception No. XXII.

The plaintiff excepts to the conclusion of the Master, both as stated in the formal conclusions ((b) p. 147), and in the body of the report (p. 76) to the same effect, that "The maxim that 'He who seeks equity must do equity' requires that the substitution proposed by N. P. exhibit 145 be allowed".

For grounds of such exception, plaintiff says:

(a) Said conclusion is erroneous and contrary to law.

(b) The allowance of such substitution of base is not within the powers of this Court nor authorized by law.

(c) It is the Company which seeks affirmative equitable relief by way of substitution of losses, and the maxim has no application to support such relief.

(d) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as in these exceptions specified.

(e) The findings of fact as made do not support such conclusion as a matter of law.

(f) No allegations of the pleadings warrant the award or allowance of substitution of base.

(g) The Master erroneously admitted in evidence, over the objection of the plaintiff that the same was irrelevant and inadmissible by reason of there being no issue with respect thereto raised by the pleadings and no allegations in the pleadings in support thereof, the N. P. Exhibit 138 and other evidence and testimony offered by the Company in support of its request for substitution of base (Tr. 615 and 616).

(h) The Master erroneously attempts to apply the maxim without giving consideration to the issues of fraud, forfeiture or breach of contract on the part of the Company, or any other equity militating against the Company.

(i) Said conclusion is erroneous for all the reasons set forth as grounds of Exception No. XXI. [752]

Exception No. XXIII.

The plaintiff excepts to the conclusion of the Master, both as stated in the formal conclusions ((c) p. 148), and in the body of the report

(pp. 80-82) to the same effect, that "The Mutual mistake as to the terms of the mineral indemnity proviso was not a mistake of law, but of fact, and is therefore correctible."

For grounds of such exception, plaintiff says:

(a) Said conclusion is erroneous and contrary to law.

(b) The allowance of substitution of base, under the guise of correction of a mistake or otherwise, is not within the powers of this Court nor authorized by law.

(c) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as in these exceptions specified.

(d) The findings of fact as made do not support such conclusion as a matter of law.

(e) The Company has pleaded no matters of facts to Warrant such conclusion, nor has it prayed for such relief.

(f) Said conclusion is erroneous for all the reasons set forth as ground of Exception No. XXI.

Exception No. XXIV.

Plaintiff excepts to the conclusion of the Master, both as stated in the formal conclusions ((d) p. 148), and in the body of the report (p. 93) to the same effect, that "The mistake should be corrected by permitting the company to withdraw its assigned

general losses and substitute therefor mineral losses as proposed by said exhibit."

For grounds of such exception, plaintiff says:

(a) Said conclusion is erroneous and contrary to law.

(b) The allowance of such substitution is not within the powers of this Court nor authorized by law. [753]

(c) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as in these exceptions specified.

(d) The findings of fact as made do not support such conclusion as a matter of law.

(e) The Company has pleaded no matters or facts to warrant such conclusion, nor has it prayed for such relief.

(f) Such conclusion is erroneous for all the reasons set forth as grounds of Exception No. XXI.

Exception No. XXV.

The plaintiff excepts to the conclusions of the Master in relation to substitution of losses, to the effect that "the Court may permit or refuse (substitution of base)" ((a) p. 147), that the equitable maxim quoted "requires that the substitution proposed by N. P. Exhibit 145 be allowed" ((b) p. 147), that the mistake as to the terms of the mineral indemnity is correctible ((c) p. 148), and should be corrected by permitting the Company to withdraw its assigned general losses and substitute therefor

mineral losses as proposed by said exhibit ((d) p. 148).

As further grounds for such exception to each and every part of said conclusions, and to all thereof, and by way of further exception to said report and the findings and conclusions thereof relating to substitution of losses, plaintiff says:

(a) Said conclusions and each and all thereof, are erroneous for the reason that the evidence disclosed and required a finding which the Master should have made, that the selections of the greater portion of the lands previously patented and in respect to which mineral losses are sought to be substituted as base were made prior to 1888 (Testimony of the witness Schwarm, Tr. 942 to 943 a), and so close in point of time to the grant as to require an inference of knowledge of the language of the act, and that the facts referred to in Subdivisions (b) and (c) of Exception No. XVI conclusively show such knowledge. [754]

(b) Said conclusions, and each and all thereof, are erroneous for the reason that the evidence disclosed and required a finding which the Master should have made that the Company, by acquiescing in the refusal of the Department of the Interior to permit substitution of base, by taking no appeal from the decision of the Commissioner, while writing the letter of Britton & Gray (Government Exhibit 297), United with the officers of the United States in

putting a practical construction upon the provisions of the grant by the conduct of both parties thereto.

(c) Said conclusions, and each and all thereof, are erroneous for the reason that the evidence disclosed and required a finding or conclusion which the Master should have made, that the issuance of patents upon the lands in respect to which the Company now requests that unused base be substituted, and pursuant to selections of the Company assigning base, constituted a completed transaction and an adjudication by the Interior Department as to the Company's right to the land selected upon the basis of the losses assigned, which this Court will not modify, change, or disturb.

(d) Said conclusions, and each and all of them, are erroneous for the reason that the evidence disclosed and required a finding or conclusion, which the Master should have made, that by participating in the making of any withdrawal that would be invalidated by the granting of substitution of base, the Secretary of the Interior exercised all powers vested in him in denial of substitution of base.

(e) Said conclusions, and each and all of them, are erroneous for the reason that the evidence disclosed and required a finding or conclusion, which the Master should have made, that the Company in selecting indemnity lands, assigning base therefor, submitting the same to

the Department of the Interior for action and securing patents for the lands so selected, elected to exercise its rights [755] of selection as it did, and that the resultant acquisition of such lands was in each case a completed transaction which neither the Company nor the Court may now modify.

(f) Said conclusions, and each and all of them are erroneous for the reason that the evidence disclosed and required a finding or conclusion, which the Master should have made, that the Company is barred by its own delay and laches from substituting base or losses, and from procuring such substitution from this Court.

Exception No. XXVI.

The plaintiff excepts to the conclusions of the Master, both as stated in the formal conclusions ((e) p. 148), and in the body of the report (pp. 88-93) to the same effect, that "The action of the Company in making its several assignments of general losses was not an election, first, because the common law doctrine of election is not applicable to these selections, and second, because, if it were, the election was made under a mistake of fact and is not binding."

For grounds of such exception, plaintiff says:

(a) Said conclusion is erroneous and contrary to law.

(b) The evidence before the Master (N. P. Exhibit 167) discloses that the selection of

lands acquired by the Company was done and performed by the Company itself, which presented the losses upon which the several selections were based and acquired title to the lands so selected by its own voluntary action and choice of base, and that thereby the Company elected to make selections and utilize base in the accomplishment of completed transactions.

(c) The evidence and other findings of the Master referred to and specified in the grounds of Exceptions Nos. XVI, XVII and XVIII discloses that no mistake of fact occurred.

(d) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as in these exceptions specified.

(e) The findings of fact do not support such conclusion as a matter of law. [756]

Exception No. XXVII.

The plaintiff excepts to the conclusion of the Master, as stated in the formal conclusions ((f) p. 148) to the effect that "After denial by the Department of its requests for substitution, the company had no remedy, and did not acquiesce in the rejection of its requests."

For grounds of such exception, plaintiff says:

(a) The conclusion that the Company did not acquiesce in such rejection is erroneous and contrary to law.

(b) The failure to take an appeal from the decision of the Commissioner of the General

Land Office (Government Exhibit 295) and the writing of the letter by Britton & Gray (Government Exhibit 297) did, as a matter of law, amount to an acquiescence in the rejection of the request for substitution.

Exception No. XXVIII.

The plaintiff excepts to the conclusion of the Master, as stated in the formal conclusions ((g) p. 148), that "the letter from Messrs. Britton & Gray did not amount to nor evidence any acquiescence by the Company in the general principle of the right of substitution, nor amount to more than a statement by counsel to the Secretary that they would pursue the matter no further before him. It could not have been said that after that letter was written the Company could make of him no further requests for substitution, and it most certainly does not affect the Company's right under the principle that the plaintiff must do equity".

For grounds of such exception, plaintiff says:

(a) Said conclusion is erroneous and contrary to law.

(b) The letter referred to in fact discloses an acquiescence by the Company in the ruling of the [757] Commissioner of the General Land Office, particularly in view of the failure to take an appeal as provided by law.

(c) The equitable principle referred to does not aid the Company in seeking affirmative equitable relief by way of substitution of losses and therefore does not apply.

(d) The conclusion is contrary to findings of fact (f) and (g) made by the Master on page 147 of the report.

Exception No. XXIX.

The plaintiff excepts to the failure of the Master to find as requested by plaintiff (plaintiff's request for finding of fact No. 35) "That the claims of the defendants to the patented lands on which defendants now request that unused base be substituted have been adjudicated by the Interior Department which adjudications have resulted in the issuance of patents to the Railroad Company or Railway Company and these proceedings have been acquiesced in by defendants for twenty to fifty years." The reason for this exception is that the testimony of the witness Schwarm (Tr. 942, 943 and 943a) shows that the lands on which substitution of base is now being asked were originally selected by the Company between 1883 and 1897, the bulk of them being selected in 1883, 1885 and 1887 and that the lands so selected were patented to the Company from 1893 or 1894 up to 1924. N. P. Exhibit 167 shows that the patented lands in the grant of 1864 on which the Company is now asking substitution of base were patented to the Company as indemnity lands from twenty to forty years ago. There is no evidence that the Company has sought to disturb these adjudications prior to the trial of this case, except as to approximately fifteen thousand acres of patented lands involved in Bismarck Lists 54 and 56.

Exception No. XXX.

The plaintiff excepts to the failure of the Master to find as requested by plaintiff (plaintiff's request for findings of fact No. 36) "That no contention is made in this case that the proceedings in the Interior Department, by which conveyances of the patented lands on which defendants now ask that base be substituted were obtained, are for [758] any reason erroneous or invalid." The reason for this exception is that there is no evidence, nor any statement of counsel appearing in the record or in the briefs on file before the Master, charging that the proceedings in the Interior Department, which resulted in the issuance of patents to lands on which defendants now ask substitution of base are for any reason erroneous or invalid.

Exception No. XXXI.

Plaintiff excepts to the failure of the Master to find as requested by plaintiff (plaintiff's request for findings of fact No. 37) "That defendants have had most of the substitute losses which they now offer in substitution for original losses for upwards of thirty years and some of them for upwards of fifty years and that they have not, prior to the trial of this case, offered them in substitution except as to approximately fifteen thousand acres of losses involved in Bismarck Lists numbered 54 and 56", and to the Master's conclusion (p. 94) to the effect that the doctrine of laches has no application to prevent substitution of base. The reason for this excep-

tion is that N. P. Exhibit 167 shows that some of the losses now offered in substitution are prior losses established by the definite location of the road and many of the losses resulted from mineral classification approved in the years 1897 to 1903 inclusive. There is no evidence that these losses were offered in substitution prior to the trial of this case, except as to losses involved in Bismarck Lists 54 and 56. The conclusion that laches is not applicable is contrary to law.

Exception No. XXXII.

The plaintiff excepts to the failure of the Master to find that the Company has, since January 9, 1915, when the Company's request for substitution of base for indemnity originally offered in Bismarck Lists 54 and 56 was denied, acquiesced in the denial of such request for substitution of base, which finding the plaintiff requested the Special Master to make in its request No. 38. The reason for this exception is that Government Exhibit 297 shows that the Company acquiesced in the denial of its request for the substitution of base involved in Bismarck Lists 54 and 56 and there is no evidence to the contrary.

[759]

Exception No. XXXIII.

The plaintiff excepts to the failure of the Master to find, as requested by plaintiff in its requested finding of fact No. 39, "That ever since the withdrawal of the second indemnity lands in Montana and Idaho to which defendants in their Exhibit 145

have assigned original losses which they propose shall be released by substitution, the plaintiff has had said lands under administration and has expended large sums of money thereon for preservation, development and protection of said lands." The reason for this exception is that in Subdivisions XXI and XXXVII of plaintiff's amended bill of complaint these facts are alleged and they are, in substance, admitted in Subdivisions XXI and XXXVII of the Company's amended answer.

Exception No. XXXIV.

The plaintiff excepts to the failure of the Master to find, as requested in plaintiff's requested finding of fact No. 40, "That there is no proof in this case showing that the patented lands which have heretofore been obtained by defendants by use of Montana or Idaho subsequent base and on which defendants now request that they be permitted to substitute mineral base, as shown by defendants' Exhibit 145, are now or were, at the time said lands were patented, agricultural lands." The reason for this exception is that the record does not contain any proof justifying a finding that the patented lands on which defendants' request that the Court allow substitution of mineral base are now, or were at the time they were patented, agricultural lands.

Exception No. XXXV.

The plaintiff excepts to the failure of the Master to find, as requested by plaintiff in its requested finding of fact No. 41, "That the proof in this case

is wholly inadequate to show that the patented lands which were obtained by defendants by use of Montana or Idaho subsequent base and on which defendants now request that they be per- [760] mitted to substitute mineral base are now, or were, at the dates said lands were selected or patented, non-coal and non-iron lands." The reasons for this exception are:

(a) That there is no competent proof justifying a finding that such patented lands are now, or were, at the times they were selected or patented, non-coal lands; and

(b) There is no proof in the record that such lands are now, or were, at the times they were selected or patented, non-iron lands, all as pointed out in Exception No. IX.

Exception No. XXXVI.

The plaintiff excepts to the rulings of the Master admitting in evidence defendants' testimony and exhibits in support of their request for substitution of base over the objection of the plaintiff that defendants did not allege facts entitling them to substitution of base, or pray for relief of that kind, and, further, that they have no right as a matter of law to substitution of base. The ruling upon the admission of defendants' Exhibit 138, being their first substitution exhibit, appearing at pages 615 and 616 of the transcript of evidence. The objection was further urged as to all the proof offered by defendants in support of their request for substitution, as

shown at pages 629, 630, 657, 715, 717, 729 and 802 of the transcript of evidence.

The admission of the evidence was erroneous for the following reasons:

(a) Defendants did not plead any facts entitling them to substitution of base nor did they make any request in their pleadings that they be allowed to substitute base.

(b) Defendants have no right in law or equity to substitution of base.

Exception No. XXXVII.

The plaintiff excepts to the Master's findings and conclusions with respect to substitution of losses, and particularly to the con- [761] clusion that the Company should be permitted to substitute losses as proposed in N. P. Exhibit 145, for the reason that the Master's report and conclusions that such substitution of losses should be permitted amounts to the awarding to the Company of affirmative equitable relief, and plaintiff says that upon the hearing heretofore had before the Master resulting in a report and findings upon other issues previously submitted to the Master by the Court and which report was confirmed by the Court by an order or decree dated October 3, 1935, as amended January 29, 1936, the Company disclaimed any demand or request for affirmative or equitable relief. The former report of the Master referred to, as respects the plaintiff's then contention with respect to the issues of fraud, forfeiture, breach of contract on the part of the Company, and other issues raised by the or-

iginal bill of complaint, and to the effect that such issues should be heard and determined by the Court by reason of the equitable maxim that "he who comes into equity, must come with clean hands", was based and founded upon such disclaimer by the Company, and plaintiff says that by reason thereof the Company cannot now claim nor the Master award such affirmative equitable relief nor permit or allow substitution of losses as is done in such report.

Exception No. XXXVIII.

The plaintiff excepts to the Master's findings and conclusions with respect to substitution of losses, and particularly to the conclusion that the Company should be permitted to substitute losses as proposed in N. P. Exhibit 145, and as ground of this exception says:

By order or decree dated October 3, 1935, as amended January 29, 1936, the Court confirmed a former report of the Master dated May 31, 1933, relating to certain of the issues in this suit. Reference to such report and decree will disclose that certain matters set out in the original bill of complaint, tendered issues for [762] the purpose of depriving the Company of relief herein under the maxim that "he who comes into equity must come with clean hands." Such report discloses that among the issues so tendered were the following:

(a) That the mineral losses now sought to be utilized as a basis for the request of substi-

tution came into existence through the fraud and misconduct of the Company.

(b) That the Company was in default in the performance of the terms of the grant in the particulars set forth in the bill, and was therefore barred from relief in this suit.

By such report and decree such issues were eliminated from the suit upon the ground that no affirmative relief was sought by the Company and that it was therefore not an actor in the suit, and hence the maxim quoted did not apply. (See former report pp. 30, 31).

By purporting to grant the Company substitution of losses upon the theory that the same is proper affirmative equitable relief, the Master now discloses a situation in which the Company is an actor, seeking affirmative relief, and subject to the application of the "clean hands" rule.

The Court ought not to sustain the findings and conclusions awarding the Company such relief, after having foreclosed plaintiff from proving equities which would operate to deny such relief under the maxim quoted.

Exception No. XXXIX.

The plaintiff excepts to the conclusion of law of the Master contained in the body of the report and stated in the language beginning with the third sentence on page 74, and concluding with the second sentence on page 75, and summarized in the words (p. 74); "I am now of the opinion, therefore, that

such adjustment of the grant is committed to this court, with the same power and authority possessed by the Secretary under the previous statute directing him to adjust," and to the Master's determination pursuant thereto that [763] the grant should be adjusted by the process of permitting substitution of losses.

Plaintiff says that said conclusion and determination are erroneous for that:

(a) It is an erroneous construction of the Act of June 25, 1929, which confers no such power on this Court.

(b) It assumes a power in this Court which would be administrative or legislative in character and not within the judicial power conferred upon this Court by section 1 of Article III of the Constitution of the United States and defined in section 2 of said Article. Said Act of June 25, 1929 could not under the limitations of said section 2 confer upon this Court power to revise, review, or otherwise deal with administrative decisions, or to exercise administrative or legislative powers, and should not be construed to attempt to do so. [764]

AVAILABILITY OF WITHDRAWN LANDS FOR INDEMNITY SELECTIONS

Exception No. XL.

The plaintiff excepts to the Master's finding (c), page 149 of the report, that "On December 31, 1935, counting withdrawn lands, whether surveyed or un-

surveyed, but excluding mineral, there was an excess of approximately 24,000 acres'' and to his statements to the same effect in the body of his report (pp. 106, 116 and 118), for the following reasons:

(a) The finding is erroneous in that it combines all losses, whether prior, subsequent or mineral losses, for comparison with withdrawn lands without regard to whether said lands are within the first indemnity limits, second indemnity limits or mineral indemnity limits, and does not make any differentiation between the character of the losses or the location of the lands.

(b) If the theory on which the finding is made were correct, the finding itself is erroneous in that it is not supported by the evidence in the following particulars:

1. The excess of approximately 24,000 acres is arrived at by assuming the total area withdrawn in the indemnity limits of the grant of 1864, as shown by plaintiff's Exhibits 110 to 188 inclusive and 152A, 161A, 184A, 184AA, 184B, 110A, 111A, 111B, 188A, 188B and 188C to be 2,369,027.95 acres, and by deducting therefrom 30,000 acres of non-mineral lands in the second indemnity belts in Idaho, 3,300.82 acres of Fort Ellis lands in Montana, and 92,276.70 acres of withdrawn lands conceded to be mineral, whereas the lands in the item of 3,300.82 acres and the

lands in the item of 92,276.70 acres are not included in the area shown on said exhibits, but have al- [765] ready been eliminated therefrom and the correct area of the withdrawn lands as shown by the said exhibits is 2,363,901.34 acres which exceeds the area of the deficiency in the grant of 1864, as found by the Master (2,220,224.17 acres) by 143,677.17 acres. If the item of approximately 30,000 acres in the second indemnity limits in Idaho is deducted, the excess of all withdrawn lands over all losses would still be 113,677.17 acres instead of approximately 24,000 acres as found by the Master.

2. The tabulations appearing on pages 103 to 105 of the Master's report are erroneous in these respects:

(a) The area of 4,046.05 acres shown as being in Government Exhibit 126 is included in the area of 42,252.01 acres shown in Government Exhibit 123.

(b) The area of 1,825.56 acres shown as being in Government Exhibit 129 should be 2,225.56 acres.

(c) The item of 37,512.90 acres shown as being in Government Exhibit 147 should be 37,511.80 acres.

(d) The item of 4,682.17 acres shown as being in Government Exhibit 161A should be 4,682.71 acres.

(e) The item of 120 acres shown as being in Government Exhibit 177 should be omitted.

(f) The item of 1,360 acres shown as being in Government Exhibit 180 should be omitted because it is also included in the item of 5,909.68 acres shown in Government Exhibit 182.

(g) All footings should be corrected to reflect these changes. **[766]**

Exception No. XLI.

The plaintiff excepts to that part of the Master's conclusion (a), page 149 of his report, wherein he states that "In determining, therefore, whether the lands in indemnity limits were sufficient to supply the losses, neither mineral nor unsurveyed lands should be counted" and also the Master's conclusion to the same effect on page 112 of the body of his report, for the following reasons:

(a) The Master's conclusion is contrary to law.

(b) The Master's conclusion is erroneous in that he should have concluded that lands in the indemnity limits, which were unsurveyed at the time of any given withdrawal, should be counted in determining the validity of such withdrawal.

(c) The conclusion is erroneous in that the Master should have concluded that lands, which,

subsequent to the date of any given withdrawal, were found to be mineral in character, should have been counted in determining the validity of such withdrawal.

Exception No. XLII.

The plaintiff excepts to the Master's conclusion (b), page 149 of the report, wherein he says "All the withdrawals listed in Govt. Exhibits 110, 111, 113 to 188, both inclusive, 152A, 161A, 184A, 184AA, 184B, 110A, 111B, 188A, 188B and 188C were invalid and ineffective as against the indemnity selection rights of the defendants, except as to 3,300.82 acres of abandoned Fort Ellis lands" and to the Master's conclusion to the same effect in the body of his report (p. 117). (The plaintiff does not except to the conclusions of the Master as to the item of 3,300.82 acres of abandoned Fort Ellis reservation lands). The reasons for this exception are as follows:

(a) The Master's conclusion is contrary to law.

(b) The Master's conclusion is found on erroneous findings of fact as pointed out in these exceptions. [767]

(c) In making his computation of the area of public lands remaining in the indemnity belts, after the respective withdrawals were made, for the purpose of determining the validity of such withdrawals, the Master erroneously failed to include unsurveyed lands in the indemnity limits of the grant.

(d) In computing the area of vacant public lands remaining in the indemnity limits after the respective withdrawals under consideration were made, for the purpose of determining the validity of such withdrawals, the Master erroneously failed to include lands classified as mineral subsequent to the date of such withdrawals.

(e) In any event the conclusion is erroneous for the reasons stated in Exception No. XLVIII.

Exception No. XLIII.

The plaintiff excepts to the Master's conclusion (c), page 150 of his report, that the "Northern Pacific Railway Company may designate and have compensation under the act of July 25, 1929, for all such withdrawn lands, with the exception just noted, to the extent of the deficiency as found, save that in second indemnity limits in Idaho it may not select, including valid selections heretofore made in said limits, more than the quantity of its subsequent losses in Idaho, and save that it may not select lands conceded to be mineral", and to the Master's conclusion to the same effect in the body of his report (pp. 116 and 117), for the following reasons:

(a) The conclusion is contrary to law.

(b) The conclusion is based on erroneous findings of fact and conclusions of law, more particularly set forth and excepted to in these exceptions.

(c) There is no evidence that the lands described in defendants' Exhibits 144 and 146 to which mineral base is assigned are "unoccupied and unappropriated agricultural lands", whereas, [768] the undisputed evidence (Tr. 1106 to 1379) shows that such lands are not agricultural lands, except as to 10,803.17 acres thereof, as is more particularly set forth in plaintiff's Exceptions numbered VIII, X and XI hereof which are adopted and made a part of this exception, and as is further shown by the Master's finding (a) on page 144. Therefore, the Company is not entitled to compensation for such lands.

(d) There is no evidence that the Railway Company has unused losses of the character assignable to all the lands in the second indemnity limits of the States of Montana or Idaho, but on the contrary the evidence shows that the Railway Company does not have in excess of 112,676.52 acres of unused losses satisfiable in the second indemnity limits of Montana (See Govt. Exhibit 91) and does not have in excess of 21,867.58 acres of unused losses satisfiable in the second indemnity limits of Idaho (See Government Exhibit 96), whereas the withdrawn lands, above referred to, in the second indemnity limits of those States, respectively, very greatly exceed such unused losses (p. 103). The unused losses here mentioned are the only losses available upon which the Company may

base a claim for such withdrawn lands, for the reason that substitution of losses is not permissible, and this for all of the reasons set forth in Exceptions Nos. XVI to XXXIX inclusive, all of which are hereby made additional grounds for this exception.

(e) The conclusion is erroneous for that the Northern Pacific Railway Company may not have compensation for withdrawn lands in the Absaroka and Beartooth National Forests for the reasons more particularly stated in plaintiff's Exception No. XII which exception is, by reference, made a part of this exception.

(f) The conclusion is erroneous for that the Northern Pacific Railway Company may not have compensation for withdrawn lands in the Northern Cheyenne Indian Reservation for the reasons more par- [769] ticularly stated in plaintiff's Exceptions numbered XIII and XV.

(g) The conclusion is erroneous for that the Company may not have compensation for 3,710.31 acres of lands in the indemnity limits (described in Government Exhibit 288), which were entered by settlers prior to June 5, 1924 and subsequently patented to them, for the reasons more particularly set out in Exception numbered LIV which is adopted and made a part of this exception.

(h) The conclusion is erroneous for the following reasons: It appears from Government Exhibits 298, 299 and 300 that 47,686.41 acres

of the land which the Master found are mineral are in the Absaroka and Beartooth Forests in the place limits of the grant of 1864. It also appears from Government Exhibit 298 that 43,-869.41 acres of these lands were used by the Company as subsequent losses to obtain lands in the second indemnity belt in Montana. An examination of Government Exhibits 299 and 300 and N. P. Exhibit 145 and the report of the Master (p. 101) will disclose that he held that 1,600 acres of these 47,686.41 acres could be released and used as subsequent losses to obtain land in the second indemnity belt in Montana. Likewise the Master rules that the balance of 2,217 acres of these lands could be assigned as unused base to obtain lands in the second indemnity belt in Montana. To such rulings of the Master the plaintiff excepts for the reason that such lands being mineral loss may not constitute base for second indemnity.

(i) This conclusion is based upon all other conclusions relating to the deficiency at the dates of the several withdrawals, the quantity of lands in the several indemnity limits, the character of losses available for use, and the availability of indemnity land for selection. A rejection of any of such conclusions will require a different conclusion than the one here excepted to, and for that reason, plaintiff says that all grounds herein specified for exception to such other conclusions, are reasons why this conclusion is erroneous. [770]

Exception No. XLIV.

The plaintiff excepts to the Master's conclusion (d) (p. 150), that "In designating land for which it claims compensation, the railway need not specify a particular loss in place for each indemnity tract for which compensation is claimed", and to the conclusion to the same effect in the body of the Master's report (pp. 117 and 119). This conclusion is erroneous for the following reasons:

(a) It disregards the provisions of the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 relative to the selection of indemnity lands and disregards the different kinds of losses and the different indemnity limits to which they may be assigned.

(b) It is contrary to law.

Exception No. XLV.

The plaintiff excepts to the Master's failure to find, as requested by plaintiff in its request for finding of fact No. 10, that "All withdrawals by the plaintiff of public lands in the second indemnity belts in Montana made prior to December 31, 1903 were made at times when there remained in said belts more vacant public land than was required to satisfy the unused subsequent losses existing at the respective dates of such withdrawals", for the following reasons.

(a) Plaintiff's Exhibit No. 91 shows that all withdrawals in the second indemnity belts in Montana, made prior to December 31, 1903,

were made at times when there remained in said belts more vacant public land than was required to satisfy the unused losses satisfiable in said belts and this fact is also shown by the uncontradicted testimony of the witness Barber (Tr. 550 to 553).

(b) There is no evidence to the contrary.

Exception No. XLVI.

The plaintiff excepts to the failure of the Master to find, as requested by plaintiff (No. 12), that "All withdrawals by the plaintiff of public lands in the second indemnity belts in Idaho, made [771] prior to December 31, 1905, were made at times when there remained in said belts more vacant public lands than were required to satisfy the unused subsequent losses existing at the respective dates of such withdrawals", for the following reasons:

(a) Plaintiff's Exhibit 96 shows that at the times of all the respective withdrawals made prior to December 31, 1905 the vacant public lands in the second indemnity belts in Idaho exceeded the unused losses satisfiable in said indemnity belts. This is also shown by the witness Barber (Tr. 169 and 170).

(b) There is no evidence to the contrary.

Exception No. XLVII.

The plaintiff excepts to the failure of the Master to find, as requested by plaintiff (No. 13), that "After the withdrawal on March 1, 1898 of 163,280 acres in the second indemnity belt in Idaho, as

shown by Government Exhibit No. 96, there remained 270,583.37 acres of vacant public land in said belt of which 25,500.72 acres were surveyed, and that the unused subsequent losses satisfiable in said belt at the time of said withdrawal aggregated 30,879.76 acres''. The reasons for this exception are as follows:

(a) Plaintiff's exhibit 96 shows that after the withdrawals on March 1, 1898 of 163,280.00 acres in the second indemnity belts in Idaho there remained 270,583.37 acres of vacant public land in said belts and that the unused losses at the end of the year were 30,879.76 acres and at the end of the previous year 58,180.65 acres, and plaintiff's Exhibit 95 shows that of the 270,583.37 acres of vacant land in said belts at the end of the year 25,500.72 acres were surveyed.

(b) The proof referred to in (a) of this exception is not disputed and there is no evidence to the contrary.

(c) Even if the Master should have been of the opinion that unsurveyed vacant public lands in said indemnity belts on the date [772] of such withdrawal should not be counted in computing the amount remaining for the satisfaction of losses satisfiable in said belts, he should have found that said withdrawals of March 1, 1898 were valid except as to 5,379.04 acres, the difference between 30,879.76 acres and 25,-500.72 acres.

Exception No. XLVIII.

The plaintiff excepts to the failure of the Master to find, as requested by plaintiff (No. 14), that "On March 21, 1905 the Government withdrew for forest purposes 108,683.73 acres of land in the second indemnity limits in Idaho as shown in Government Exhibit 96: that after such withdrawal was made there remained in the second indemnity limits in Idaho 46,560.67 acres of vacant public lands of which 44,073.15 acres were surveyed as shown by Government Exhibit 95; that the unused subsequent losses in Idaho at the time said withdrawal was made were 29,576.25 acres as shown on Government Exhibit No. 96; that after said withdrawal was made the remaining vacant surveyed public lands in the second indemnity belt in Idaho exceeded the unused subsequent losses by 14,496.90 acres." The reasons for this exception are as follows:

(a) Even if the Master were correct in holding that unsurveyed lands and lands subsequent classified as mineral should not be included in computing the area of vacant public lands within the indemnity limits on the date of said withdrawal of March 21, 1905, for the purpose of determining the validity of said withdrawal, he should have found the above facts which are shown by plaintiff's Exhibits 95 and 96.

(b) There is no evidence to the contrary.

(Such finding would require a holding that the withdrawal mentioned was valid. The Master has

erroneously avoided this necessary hold- [773] ing by allowing substitution of base, and apparently relating it back prior to this withdrawal to invalidate a withdrawal that was otherwise valid).

Exception No. XLIX.

The plaintiff excepts to the conclusion of the Master (p. 110 in the body of his report) that the satisfaction of losses "is as though all losses were equally flexible, and might be satisfied indiscriminately" and that the several sorts of losses are, in practical effect, interchangeable (p. 117) for the reason that such conclusion is contrary to law.

Exception No. L.

The plaintiff excepts to the conclusion of the Master, (p. 116) in the body of his report, to the effect that the Company's selection rights were, in substance, taken by eminent domain by means of the Act of June 25, 1929. The reasons for this exception are:

(a) The conclusion is contrary to law.

(b) The conclusion is not supported by any proof but is contrary to the facts.

Exception No. LI.

The plaintiff excepts to the conclusion of the Master (p. 118) that "The excess at present is so small—about 24,000 acres out of 2,244,000—as to bring the case almost within the rule of the Land Office and the courts, that no selection is necessary

when all the lands are required to satisfy the deficiency. All are appropriated". The reasons for this exception are:

(a) The conclusion is contrary to the facts as more specifically pointed out in No. XL of these exceptions.

(b) The conclusion is contrary to law. [774]

Exception No. LII.

The plaintiff excepts to the Master's conclusion of law on page 10 of the body of his report to the effect:

"The language of the resolution authorizing second indemnity limits uses the term 'subsequent to the passage of the act' only as a measure of the quantity of losses that may be satisfied in second indemnity, not as a definition of the character of those losses. So long as the selections made in second indemnity do not exceed the subsequent losses, both prior and subsequent losses may be satisfied in second indemnity."

For reasons of such exception the plaintiff says:

(a) That such conclusion is contrary to the terms of the grant of July 2, 1864, and of the Resolution of May 31, 1870.

(b) That such conclusion is contrary to the holding of the Land Department that only subsequent losses can be indemnified in second

indemnity limits, as pointed out by the Master in the body of his report at page 10.

Exception No. LIII.

The plaintiff excepts to the Master's conclusion on page 105 in so far as he holds that the amount of second indemnity lands in withdrawals in Idaho which are beyond reach is "about 30,000 acres", in that the amount so beyond reach greatly exceeds 30,000 acres, for the reason that valid withdrawals in Idaho to which attention has been called in Exceptions XLIII, XLVI, XLVII and XLVIII, greatly augment the quantity of lands in Idaho for which no compensation is payable.

Lands Patented to Homesteaders After Withdrawal.

Exception No. LIV.

The plaintiff excepts to the Master's conclusion of law, page 150 of his report, as to 3,710.31 acres entered under the general homestead laws or by other filings prior to the Act of June 5, 1924 that "Since the withdrawals were invalid, the company should have compensation as though the lands remained in their withdrawn status and had not been [775] patented." This conclusion is erroneous for the reason that as the entries were made prior to June 5, 1924, followed by patents issued to the applicants, the title of the applicants related back to the dates of entry and these lands were not a part of the withdrawals on June 5, 1924 and there-

fore no compensation therefor, under the terms of the Act of June 25, 1929, can be awarded to the Company.

1,641.27 Acres in Former Fort Ellis Military Reservation.

Exception No. LV.

The plaintiff excepts to the failure of the Master to find as a fact as requested by the United States in its 45th request for findings of fact "That 1.641.27 acres in former Fort Ellis Military reservation and referred to on Northern Pacific Exhibit 138 Revised was a mineral loss." The evidence of the Company's witness Schwarm (Tr. 637-638) and N. P. Exhibit 138 Revised show that this land was in the military reservation created November 25, 1873 when the railroad was located opposite this land. In July 1895 the land was classified as mineral by Bozeman Board of Mineral Commissioners, approved by the Secretary of the Interior January 14, 1896, and the Company thereafter used it as a mineral loss to secure, and did secure, patent for lands in place limits in Montana.

Exception No. LVI.

The plaintiff excepts to the ruling of the Master on pages 69, 71 and 101 of his report that the Company now has the right to treat the loss mentioned in Exception No. LV as a subsequent loss and substitute a mineral loss for it and thereby increase its subsequent losses to that extent.

For grounds for this exception, the plaintiff says:

[776]

(a) Such substitution is contrary to law and not within the rights of the Company.

(b) The Master bases such ruling upon his assertion (p. 71), "The government has indicated no objection to these incidental substitutions", which is an error for that the plaintiff requested the finding set forth in Exception LV, cross examined the witness Schwarm thereon (Tr. 768 to 771), and clearly stated its position at the trial (Tr. 772), and in its printed brief, pages 12-14.

(c) Such loss was treated as a mineral loss (Witness Schwarm, Tr. 770). Selections of place lands were made thereon as such, and such selections approved.

Grant of 1870.

Authorization of Second Indemnity Limits.

Exception No. LVII.

The plaintiff excepts to the conclusion of the Master on page 150 of his report that "It is concluded the Joint Resolution of May 31, 1870, authorized the laying down of second indemnity limits in Washington in event of deficiency at final location", for the reason said conclusion is erroneous in that the Joint Resolution which authorized a second indemnity belt of ten miles "beyond the limits prescribed in (the) charter", does not authorize such belt opposite the new line from Portland to Puget Sound, the construction of which was author-

ized by the said Joint Resolution and not by the charter Act of July 2, 1964.

Both Grants.

Exception No. LVIII.

The plaintiff excepts to the conclusion of the Master (c) on page 150 of his report to the effect that the Northern Pacific Railway Company may designate and have compensation for any withdrawn lands in the grant of 1864, and to the conclusion of the Master (e), page 153, that the Company may designate and have [777] compensation for any withdrawn land in the grant of 1870, and to the conclusions that the withdrawals mentioned were invalid. For grounds of this exception plaintiff says:

(a) The Railroad Company and the Railway Company have breached the contract by which said grants were made in the respects pointed out in plaintiff's amended bill of complaint and have been guilty of fraud and unconscionable conduct in the performance of said contract.

(b) The Company did not construct the road contemplated by the contract, nor was the road as the same was constructed, completed within the time limited in the contract.

(c) Matters and facts alleged in plaintiff's amended bill of complaint show that the Com-

pany is not entitled in law or in equity to compensation for any of such withdrawn lands.

Respectfully submitted,

J. CRAWFORD BIGGS
E. E. DANLY
NORMAN M. LITTELL
WALTER L. POPE
Special Assistants to the Attorney General.

Dated August 13, 1937. [778]

RETURN ON SERVICE OF EXCEPTIONS.

United States of America,
Eastern District of Washington—ss.

I hereby certify and return that I served the annexed exceptions of the United States to the Report of the Special Master filed on July 26, 1937, upon F. J. McKevitt, Solicitor for the Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company, Bankers Trust Company, Guaranty Trust Company and City Bank Farmers Trust Company; by handing to and leaving a true and correct copy thereof with said F. J. McKevitt personally, at Spokane, in said District on the 13th day of August, A. D. 1937.

WAYNE BEZONA
U. S. Marshal.

By.....
Deputy.

[Endorsed]: Filed Aug. 13, 1937. [779]

[Title of District Court and Cause.]

MOTION ON BEHALF OF THE NORTHERN PACIFIC RAILROAD COMPANY TO EXTEND TIME TO FILE EXCEPTIONS TO COMMISSIONER'S REPORT.

Now comes Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Haenhlen, on behalf of themselves and all other minority stockholders of the Northern Pacific Railroad Company and move the Court to extend the time within which the said Northern Pacific Railroad Company may file exceptions to the report of Commissioner F. H. Graves for a period of thirty days in addition to the time allowed by the rules and by the report.

These movants are filing this on behalf and for the benefit of the Northern Pacific Railroad Company, for which said Railroad company the said movants are preparing and will within a few days file an answer for and on behalf of the said Northern Pacific Railroad Company in this suit.

ROBERT L. EDMISTON
THOMAS BOYLAN
HUDSON & HUDSON
Attorneys for Movants.

Aug. 28, 1937. Copy Received.
F. J. McKEVITT
J. M. SIMPSON
by E. W.

[Endorsed]: Filed Aug. 25, 1937. [780]

[Title of District Court and Cause.]

ANSWER AND CROSS BILL OF THE NORTHERN PACIFIC RAILROAD COMPANY BY CHARLES E. SCHMIDT AND OTHER MINORITY STOCKHOLDERS OF SAID RAILROAD COMPANY.

Now comes the Northern Pacific Railroad Company by Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Lobenthal, and Walter L. Haenhlen, holders and owners of common and preferred stock of the said Northern Pacific Railroad Company, on behalf of themselves and all others similarly situated of whom the holders of approximately 30,000 shares of said stock are cooperating with these, being practically all of the stock of said railroad company except that which is in possession of the Northern Pacific Railway Company, whether cancelled or owned by said railway company these defendants do not have sufficient knowledge to allege, and for separate answer and cross bill to the bill of complaint as amended and to the answer of the said other defendants herein says:

First. The parties as minority stockholders filing this answer and cross bill on behalf of the said Northern Pacific Railroad Company, hereinafter called the railroad company, are enumerated below. All of the said individual minority stock- [781] holders are over the age of 21 years, are residents

of the State of Pennsylvania and own and hold common and/or preferred stock of said Northern Pacific Railroad Company as follows:

(a) George Landell is the duly appointed and qualified executor of the Estate of the late E. A. Landell, and said E. A. Landell owned at the time of his death and there has come into the hands of the executor, which he now owns and holds, 200 shares of said common stock of said railroad company, being certificates No. A 42067 and A 42068 for 100 shares each, dated June 13, 1890.

(b) Clarence Loebenthal is the duly appointed and qualified trustee for Bernard Loebenthal, and owns and holds 1500 shares of the common stock of said railroad company, being certificates No. A 56090 to A 56104 inclusive for 100 shares each, dated December 30, 1901.

(c) Charles E. Schmidt is the owner and holder of 200 shares of the preferred stock of the said railroad company, being certificates No. 54792 and 54793 for 100 shares each, dated July 31, 1893, which were issued in the name of J. P. Paulding and Co. and duly assigned to Charles E. Schmidt.

(d) Walter L. Haehnlen is the owner and holder of 121 shares of preferred and 240 shares of common stock of the said railroad company, of which 65 shares of the common were derived from certificates No. A 55983 for 100 shares dated February 7, 1898 in the name of Brice, Monges and Company and duly assigned to Walter L. Haehnlen, and certificate No. B 8738 for 15 shares dated August 14,

1883 in the name of Samuel Forsyth; of which 100 shares of the common were derived from certificates No. B 21743 for 20 shares dated August 14, 1893 in the name of DeHaven & Townsend and duly assigned to Walter L. Haehnlen, certificate No. B 22104 for 15 shares dated September 2, 1893 in the name of Dehaven & Townsend and duly assigned to Walter L. [782] Haehnlen, certificate No. B 21923 for 55 shares dated August 22, 1893 in the name of DeHaven & Townsend and duly assigned to Walter L. Haehnlen, certificate No. C 12011 for 10 shares dated August 30 1893 in the name of DeHaven & Townsend and duly assigned to Walter L. Haehnlen and certificate No. A 56134 for 100 shares dated September 22, 1902 in the name of Joseph I. Keefe and duly assigned to Walter L. Haehnlen; of which 50 shares of common were derived from certificate No. A 49237 for 100 shares dated November 4, 1892 in the name of Patrick Cunningham and duly assigned to Walter L. Haehnlen; of which 15 shares of the preferred is the original certificate No. 051461 issued in the name of Jacob Witmer, dated June 2, 1891 and duly assigned to Walter L. Haehnlen; of which 50 shares of preferred were derived from certificates No. 56503 and 56504 for 100 shares each in the name of Katharine M. Lewis, dated June 14, 1906, and No. 059271 for 12 shares, dated June 14, 1906 in the name of Katharine M. Lewis and duly assigned to Walter L. Haehnlen. [783]

Second. This answer and cross bill is on behalf of the Northern Pacific Railroad Company and the

minority stockholders of the said Northern Pacific Railroad Company above mentioned and hereinafter described and all other common and preferred stockholders of the said railroad company who may join herein and share the costs of the suit to redress, restrain or avoid the effect of certain unlawful and wrongful acts had, done and threatened which have resulted in and will result in damage and injuries to the said railroad company and the complainants and all other holders of the common and preferred stock of the said railroad company hereinafter in the cross bill portion more particularly and in detail averred and to that end to vacate and set aside all unlawful acts and actions had and done and to declare the rights of all parties and to redress all wrongs and to enjoin and restrain all further and proposed unlawful acts and deeds. One of the principal bases of the answer and cross bill is to restore to the said railroad company all its rights, privileges, franchises, properties, money and assets, free and clear of all encumbrances, interference or management of and by the said Northern Pacific Railway Company, hereinafter called the railway company, and to release the said railroad company from the captivities which it has been put into and held under by the wrongful and unlawful acts of the said railway company and the officers and officials of the said railway company and the said railroad company as hereinafter set out and to declare, decree and enforce all the rights of the said railroad company and of these minority stock-

holders and all others in a similar position and of all of the said defendants and of all other persons interested as provided and mandatorily required in the Act of Congress approved June 5, 1929, sections 5 and 6, amending the act of July 2, 1864, and the Joint Resolution of May 31, 1870 (46 Stats. 355) as provided in part as follows: [784]

> "Sec. 5. * * * In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine to what extent the terms, conditions, and covenants, expressed or implied, in said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in said resolution of May 31, 1870 and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands, and relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law, or fact, or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, and

the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court all questions of law and fact, and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies, or their successors in interest under said Act of July 2, 1864, and said joint resolution of May 31, 1870, and in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment." * * *

"Sec. 6. * * * To carry out this enactment the court may render such judgments and decrees as law and equity may require."

Third. The facts alleged in the bill of complaint as amended are insufficient to constitute any valid cause of action in equity, save for expropriation of indemnity lands in national forests and other government reservations.

Defendant prays that all of said bill of complaint be dismissed except subdivisions I, II, III, V, the first two paragraphs of IX, the third paragraph of

X, XVI, XVII, XX, XXI, XXXVII, and the first sub-paragraph of paragraph (1) of subdivision XLII.

I.

This defendant railroad company admits the allegations of Paragraph 1 of the amended bill except so far as they are contradicted or denied hereinafter in the cross bill. [785]

II.

This defendant railroad company admits the allegations of Paragraph 2 of the amended bill except so far as they are contradicted or denied hereinafter in the cross bill.

III.

This defendant railroad company admits the allegations of Paragraph 3 of the amended bill except so far as they are contradicted or denied hereinafter in the cross bill.

IV.

This defendant railroad company admits the allegations of Paragraph 4 of the amended bill except so far as they are contradicted or denied hereinafter in the cross bill.

V.

This defendant railroad company admits the allegations of Paragraph 5 of the amended bill except so far as they are contradicted or denied hereinafter in the cross bill.

VI.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the sixth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

VII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the seventh paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

VIII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the eighth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed. [786]

IX.

This defendant railroad company admits the allegations of the first two paragraphs of Paragraph 9 of the amended bill except so far as they are contradicted or denied hereinafter in the cross bill.

As to the remaining portion of Paragraph 9 of the amended bill these minority stockholders and this defendant railroad company are advised that it is not necessary to answer same as a demurrer to same has been sustained and they were dismissed from the amended bill.

X.

This defendant railroad company denies the validity of the so-called mortgages and so-called foreclosure alleged in Paragraph 3 of Paragraph 10 of the amended bill and the other allegations of said paragraph are fully answered by the allegations of the cross bill herein.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the remaining allegations of Paragraph 10 of the amended bill as a demurrer thereto has been sustained and they were dismissed from the bill.

XI.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the eleventh paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the twelfth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XIII.

These minority stockholders and this defendant railroad com- [787] pany are advised that it is not necessary to answer the thirteenth paragraph of

the amended bill as a demurrer thereto was sustained and it was dismissed.

XIV.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the fourteenth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XV.

These minority stockholders of this defendant railroad company are advised that it is not necessary to answer the fifteenth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XVI.

This defendant railroad company admits the allegations of Paragraph 16 of the amended bill except so far as they are contradicted or denied hereinafter in the cross bill.

XVII.

This defendant neither admits nor denies but calls for strict proof of the allegations of Paragraph 17 of the amended bill, as the minority stockholders filing this answer have not at the present time sufficient knowledge of all the facts on which to base an answer.

XVIII.

These minority stockholders and this defendant railroad company are advised that it is not neces-

sary to answer the eighteenth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XIX.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the nineteenth [788] paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XX.

This defendant neither admits nor denies but calls for strict proof of Paragraph 20 of the amended bill, as the minority stockholders have not at the present time sufficient knowledge of all the facts on which to base an answer, but this defendant railroad company is informed, believes and denies that the said errors of law and fact were in anyway induced by any act or deed of this defendant, Northern Pacific Railroad Company, or the so-called defendant Northern Pacific Railway Company, and denies as a consequence of said erorrs or in any other way either the said railroad company or the so-called railway company has received more land than it, said Railroad Company, is entitled to receive under said grant. The Secretary of Interior has made other errors of law and fact, which have denied to this defendant railroad company the right to receive large areas of land to which it is justly entitled. This defendant railroad company denies that any claim upon its behalf is being or has been wrongfully asserted.

XXI.

These minority stockholders on behalf of the defendant railroad company being without knowledge of all the allegations of Paragraph 21 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to [789] the said cross bill and leave is asked and reserved to answer further to the said Paragraph 21 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXII.

These minority stockholders on behalf of the defendant railroad company being without knowledge of all the allegations of Paragraph 22 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so

allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 22 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this defendant railroad company, and leave is asked and reserved to answer further to the said Paragraph 22 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXIII.

These minority stockholders on behalf of the defendant railroad company, being without knowledge of all the allegations of Paragraph 23 of the amended bill, as these minority stockholders [790] have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to

claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 23 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this defendant railroad company, and leave is asked and reserved to answer further to the said Paragraph 23 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXIV.

These minority stockholders on behalf of the defendant railroad company, being without knowledge of all the allegations of Paragraph 24 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are

contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 24 of the amended bill as having [791] been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this defendant railroad company, and leave is asked and reserved to further answer to the said Paragraph 24 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXV.

These minority stockholders on behalf of the defendant railroad company being without knowledge of all the allegations of Paragraph 25 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations

which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 25 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this defendant railroad company, and leave is asked and reserved to answer further to the said Paragraph 25 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXVI.

These minority stockholders and this defendant railroad [792] company are advised that it is not necessary to answer the twenty-sixth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXVII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the twenty-seventh paragraph of the amended bill as a demurrer thereto was sustained on application of the plaintiff, and it was dismissed.

XXVIII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the twenty-eighth paragraph of the

amended bill as a demurrer thereto was sustained and it was dismissed.

XXIX.

The copy of the decree of this Court of October 3, 1935 which these minority stockholders have states that paragraph or sub-division "XXIX" was dismissed and this defendant is advised that it is not necessary to answer any portions of the said Paragraph 29 of the bill that was so dismissed on the demurrer being sustained.

These minority stockholders on behalf of the defendant railroad company, being without knowledge of all the allegations of Paragraph 29 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any [793] and all land alleged in Paragraph 29 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross

bill and said patent should be cancelled and the lands then patented to this defendant railroad company and leave is asked and reserved to answer further to the said Paragraph 29 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXIX-a.

These minority stockholders on behalf of the defendant railroad company, being without knowledge of all the allegations of Paragraph 29-a of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 29-a of the amended bill as having been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this defendant railroad com-

pany, and leave is asked and reserved to answer further to the said Paragraph 29-a of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXX.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the thirtieth paragraph [794] of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXXI.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the thirty-first paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXXII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the thirty-second paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXXIII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the thirty-third paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXXIV.

These minority stockholders on behalf of the defendant railroad company, being without knowledge of all the allegations of Paragraph 34 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 34 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void [795] for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this defendant railroad company, and leave is asked and reserved to answer further to the said Paragraph 34 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXXV.

These minority stockholders and this defendant railroad company are advised that it is not neces-

sary to answer the thirty-fifth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXXVI.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the thirty-sixth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXXVII.

These minority stockholders on behalf of the defendant railroad company, being without knowledge of all the allegations of Paragraph 37 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 37 of the amended bill as having been patented to the so-called railway company such patent was illegal and void for the

reasons set out in the hereinafter cross bill and [796] said patent should be cancelled and the lands then patented to this defendant railroad company, and leave is asked and reserved to answer further to the said Paragraph 37 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXXVIII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the thirty-eighth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXXIX.

These minority stockholders on behalf of the defendant railroad company, being without knowledge of all the allegations of Paragraph 39 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations

which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 39 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this railroad company.

Further answering Paragraph 39 of the bill this defendant railroad company states that all of the stock of the Northwestern [797] Improvement Company held by the said so-called Northern Pacific Railway Company was, in truth and in fact, the property of this defendant railroad company and was, in fact, wrongfully taken possession of seized by the said so-called railway company and kept from and withheld from this defendant railroad company as well as all other stocks, bonds, monies, leases, royalties and lands received by the said so-called Northern Pacific Railway Company, all of which acts of the said so-called Northern Pacific Railway Company are wrongful, illegal and unlawful, as does more fully appear in the cross bill herewith. Leave is asked and reserved to answer further to the said Paragraph 39 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XL.

These minority stockholders on behalf of the defendant railroad company, being without knowl-

edge of all the allegations of Paragraph 40 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 40 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this railroad company. [798]

Further answering Paragraph 40 of the amended bill this defendant railroad company states that all of the stock of the Northwestern Improvement Company held by the said so-called Northern Pacific Railway Company, was, in truth and in fact, the property of this defendant, railroad company and was, in fact, wrongfully taken possession of, seized by the said so-called railway company and kept from and withheld from this defendant railroad company as well as all other stocks, bonds, monies, leases, royalties and lands received by the

said so-called Northern Pacific Railway Company, all of which acts of the said so-called Northern Pacific Railway Company are wrongful, illegal and unlawful, as does more fully appear in the cross bill herewith. Leave is asked and reserved to answer further to the said Paragraph 40 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XLI.

These minority stockholders on behalf of the defendant railroad company being without knowledge of all the allegations of Paragraph 41 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 41 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void [799] for the reasons set out in the hereinafter cross bill and

said patent should be cancelled and the lands then patented to this railroad company.

Further answering Paragraph 41 of the bill this defendant railroad company states that all of the stock of the Northwestern Improvement Company held by the said so-called Northern Pacific Railway Company was, in truth and in fact, the property of this defendant railroad company and was, in fact, wrongfully taken possession of, seized by the said so-called railway company and kept from and withheld from this defendant railroad company as well as all other stocks, bonds, monies, leases, royalties and lands received by the said so-called Northern Pacific Railway Company, all of which acts of the said so-called Northern Pacific Railway Company are wrongful, illegal and unlawful, as does more fully appear in the cross bill herewith. Leave is asked and reserved to answer further to the said Paragraph 41 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XLII.

This defendant railroad company, answering Paragraph 42 of the amended bill denies that the plaintiff is entitled to any relief but admits that a suit in equity is the only remedy by which the plaintiff could seek relief. [800]

XLIII.

This defendant railroad company by way of cross bill and seeking affirmative relief alleges as follows:

That this defendant, the said Northern Pacific Railroad Company, hereinafter referred to as the railroad company, was duly created and organized under the Act of Congress of July 2, 1864 (13 Stats. 365) and acts amendatory thereof and the charter and franchise and all rights, powers, privileges and property provided for by said acts were duly accepted and received by the incorporators and the said railroad company, in accordance with the said acts, duly and regularly organized and proceeded with the erection and construction and completion of the railroad lines in said acts provided for truly and faithfully in accordance with the provisions and conditions of said act, and the said railroad lines, as so constructed, were duly and properly accepted and confirmed by the President of the United States and officials of the government of the United States as required by the provisions and conditions of said act. The said railroad company maintained and operated the said line of railroad under and in accordance with the said statutes until the year 1893 with possibly the exception of the period from the 16th day of April, 1875 to March 22, 1882, during part of which period there was a null and void receivership and what might be termed an operating committee, all of which is more fully hereinafter set forth showing all the unlawful acts and wrongs committed against the said railroad company.

XLIV.

The so-called foreclosure proceeding of 1875, being the equity suit in the United States Circuit

Court for the Southern District of New York filed the 16th day of April, 1875, was not only not a foreclosure, but the defendant railway company now admits and contends that it was not a foreclosure and it is now [801] estopped to claim that it was a foreclosure, and the United States and the other defendants, because of their acts as set out in this record and exhibits and in this answer and cross bill, are likewise estopped to assert that there was a foreclosure in the said proceedings in 1875 of the mortgage executed July 1, 1870 (being Exhibit F to the amended bill, volume 1, page 11 of the printed exhibit), which is referred to and made a part hereof. In the said suit, which is entitled Jay Cooke, et als. vs. Northern Pacific Railroad Company, as shown on the face of the record, the Court did not have jurisdiction of the subject matter nor of the parties nor of the property involved, and the United States was not made a party to said suit. Thus, the proceedings, decrees and actions taken, had and done in said suit are absolutely null and void on the face of the record and beyond the power and jurisdiction of said court and of no effect, and the said mortgage of July 1, 1870 is in full force and effect and is still a lien in fact and on the public record on all the property, assets, rights and franchises of the said railroad company mentioned and described in the said mortgage, is unreleased and unsatisfied and the said bonds secured under the said mortgage are in the treasury of the said railroad company as security for the purposes hereinafter stated and set

forth; that the said mortgage of July 1, 1870 is the only mortgage the United States ever authorized the Northern Pacific Railroad Company to execute and the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 prohibited and forbid any other mortgages being executed by the said railroad company without the consent of Congress and all other purported mortgages and bond issues thereafter claimed to be issued and in effect and which are described and set out in the proceedings in this suit are ultra vires, forbidden by statute, null and void, are not binding and are without force and effect and are not a lien upon any of the [802] property of the said railroad company known as the Northern Pacific Railroad System and its franchises, rights and privileges. Said mortgage was by the said railroad, through its proper officers, duly and formally re-affirmed and declared on May 3, 1895 by deed in the following words and figures:

> "Whereas the 1st day of July, 1870, the Northern Pacific Railroad Co., a corporation created by and existing under the laws of the Congress of the United States, as therein referred to, did execute their certain deed of trust or mortgage, wherein and whereby it was provided that said Northern Pacific Railroad Co. should execute, deliver, and acknowledge all such further deeds, conveyances, and assurances in law for the better assuring unto the trustees and their successors, etc., as in said trust deed is set forth, reference to which is

hereby made, especially to section 15; Therefore be it

Resolved, That this corporation do forthwith execute, deliver and acknowledge to said trustees or their successors such further deeds, conveyances, and assurances in the law for the better assuring unto the said trustees or their successors in said trust therein expressed the lands, railway, equipment and appurtenances, hereinbefore mentioned, or intended so to be. as in said deed of trust is mentioned, and especially in said section 15, and be it further

Resolved, That the president and secretary do execute such further assurances, deeds, and conveyances as to said trustees or their successors or their counsel may seem proper, and in accordance with such trust deed; and that the president and secretary do acknowledge and seal the same in the usual form and deliver the same to said trustees or their successors for record and filing; and be it further

Resolved, That the draft of the instrument of further assurance herewith exhibited is in proper form and should be forthwith executed by this company in due form of law.

(The following is the draft of the deed of further assurances)

This indenture made the twenty-seventh day of April, one thousand eight hundred and seventy-five, by and between "The Northern Pacific Railroad Company", a corporation created

by and existing under the laws of the United States of America, party of the first part, and Jay Cooke and Charlemagne Tower, the trustees named in or at present existing under a certain mortgage or deed of trust heretofore made by said "The Northern Pacific Railroad Company" bearing date the first day of July, one thousand eight hundred and seventy, parties of the second part: Witnesseth—

Whereas heretofore the said "The Northern Pacific Railroad Company" executed, acknowledged, and delivered its certain mortgage or deed of trust bearing the date the first day of July, one thousand eight hundred and seventy wherein and whereby it conveyed in trust nevertheless and for the uses and purposes and upon the trusts herein contained, all the property of the said company of every [803] kind, nature, and description, both real and personal and mixed, corporeal or incorporeal, to Jay Cooke and John Edgar Thompson, and whereas in said deed of trust or mortgage there was a provision in the words and figures following, to wit:

'Article fifteenth. The party of the first part shall from time to time and at all times hereafter, and as often as thereunto requested by the trustees, execute, deliver, and acknowledge all such further deeds, conveyances, and assurances in the law for the better assuring unto the trustees and their successors in the trust hereby created, upon the trusts herein ex-

pressed, the lands, railway, equipments, and appurtenances hereinbefore mentioned or intended so to be, and all other property and things whatsoever, which may be hereafter acquired for use in connection with the same, or any part thereof, and all franchises now held, including the franchise to be a corporation as by the trustees or the survivors or survivor of them, or their successors, or by their or his counsel, learned in the law, shall be reasonably advised, devised or required; and the party of the first part shall furnish to the party of the second part, from time to time upon their reasonable request in writing a true and full inventory of all the movable property appertaining to the said railroad and the operations thereof, and which is transferred by this indenture; but no default to demand or to furnish such inventory shall impair the operation or effect of this indenture upon all or any of the property herein agreed to be transferred.'

Now, therefore, in order the more effectually to carry out the provisions of said deed of trust or mortgage and in consideration of the premises and of one dollar the said party of the first part by said Jay Cooke and said Charlemagne Tower in hand paid, the receipt of which is hereby acknowledged, the said "The Northern Pacific Railroad Company" has granted, bargained, sold, assigned, transferred, released, conveyed and confirmed, and by these presents,

does grant, bargain, sell, assign, transfer, release, convey and confirm, unto the parties of the second part hereto, in mortgage, and upon the trusts nevertheless in said original deed of trust or mortgage express, the lands, railway equipment and appurtenances in said deed of trust or mortgage mentioned or intended so to be, and all other property and things whatsoever which have been acquired since the execution of said deed of trust or mortgage by said "The Northern Pacific Railroad Company" for use in connection with the same or any part thereof and all franchises by it held then or since acquired, including the franchise to be a corporation.

In witness whereof the party of the first part hereto hath caused its corporate seal to be hereunto affixed and the same to be attested by its president and secretary and the parties of the second part have hereunto set their hands and seals the day and year first above written.

THE NORTHERN PACIFIC
RAILROAD COMPANY
By C. B. WRIGHT,
President
[Seal] SAMUEL WILKESON,
Secretary of the Northern
Pacific R. R. Co.
[Seal] CHARLEMAGNE TOWER [804]

Southern District of New York
City and County of New York, ss:

On this 3d day of May, 1895, before me came C. B. Wright, Samuel Wilkeson, and Charlemagne Tower, to me personally known, and the said C. B. Wright personally known to me to be president of the Northern Pacific Railroad Co., who being by me duly sworn did depose and say that he is president of said company and that he subscribed his name to said certificate by authority of said company and that the seal affixed to the same is the corporate seal of said company, and was affixed thereto by their authority, and he acknowledged to me that he executed the same for the purposes therein mentioned.

And the said Samuel Wilkeson personally known to me to be the treasurer of the said Northern Pacific Railroad Co., who being by me duly sworn did depose and say that he is treasurer of said company; that the seal affixed to the above instrument is the corporate seal of said company, and was affixed thereto by their authority and that he subscribed his name by their authority, and he acknowledged to me that he executed the same for the uses and purposes therein mentioned.

And the said Charlemagne Tower subscribed the same in my presence and acknowledged to

me that he executed the same for the uses and purposes therein mentioned.

R. Q. STILWELL
United States Commissioner for the Southern District of New York"

XLV.

That the reorganization plan of the said railroad company dated June 30, 1875, being Exhibit F-1 to the amended bill (printed exhibits Volume 1, page 23) which is hereby made a part of this bill, was in effect an operating agreement for the committee to operate the railroad and did not change the charter of the railroad company nor in anywise effect the title of the property, franchises and rights of the said railroad company but provided for an agreement by the stockholders without increasing the stock principal, then 1,000,000 shares of the par value of $100 each, but gave the preferred stockholders voting rights under certain circumstances, as therein set out, over the remaining or common stockholders. But the true purport and effect of the said agreement was to give the holders of what was termed preferred stock certain preferential rights for certain times over the other [805] stockholders. This stock was issued to holders of the bonds and other indebtedness so that the bonds could be retired into the treasury of the railroad corporation and for the benefit of and with the intent and purpose of safeguarding and securing the holders of the preferred stock and then the common stock and not

for purposes of cancellation, and in accordance therewith the railroad corporation re-established and re-affirmed said mortgage and bonds by the above set out deed of May 3, 1895.

That the proper construction of the preferred stock is that being thus secured and the said reorganization agreement further providing for the payment of the preferred stock out of sale of certain lands, which would be thereby released from mortgage, the preferred stock is, in effect, the common stock with a preference over other common stock by an agreement between the holders of the preferred and common stock, as is permissible of an interstockholders agreement without changing the charter, or the preferred stock is evidence of indebtedness with an equitable lien on the bonds in the treasury of the railroad company as secured by the mortgage of July 1, 1870.

XLVI.

The deed from Oliver Fiske and Kenneth G. White, master commissioners, to Johnson Livingstone, Frederick Billings, James K. Moorhead, John N. Hutchinson, George Stark and John N. Dennison, committee of bondholders of the Northern Pacific Railroad Company, dated September 17, 1875, Defendant's Exhibit 31, (Hearings before the Joint Congressional Committee, part 1-a, page 714) which is referred to and made a part hereof, purporting to be executed by the said master commissioners under authority of the decree of May 12, 1875 as amended by decree of August 6, 1875 under the so-called pro-

ceedings of 1875, was ultra vires, absolutely null and void and of no effect. [806]

XLVII.

That the deed from George W. Cass, receiver, to Johnson Livingstone and others, committee of bondholders of the Northern Pacific Railroad Company, dated December 28, 1875, Defendant's Exhibit 32 (hearings before the Joint Congressional Committee, part 1-a, page 723) which is referred to and made a part hereof, purporting to be executed by the receiver under authority of the decree of May 12, 1875 as amended August 6, 1875 and the decree of August 25, 1875 under the so-called proceedings of 1875 was ultra vires, absolutely null and void and of no effect.

XLVIII.

The deed from Jay Cooke and Charlemagne Tower, trustees, to Johnson Livingstone and others, committee of bondholders of the Northern Pacific Railroad Company, dated September 27, 1875, Defendant's Exhibit 33 (hearings before the Joint Congressional Committee, part 1-a, page 727) which is referred to and made a part hereof, purporting to be executed by the said trustees under authority of the decree of May 12, 1875 as amended August 6, 1875 under the socalled proceedings of 1875, was ultra vires, absolutely null and void and of no effect.

XLIX.

That the deed from George W. Cass, receiver, and Jay Cooke and Charlemagne Tower, trustees,

to Frederick Billings, dated September 16, 1876, Defendant's Exhibit 34 (hearings before the Joint Congressional Committee, part 1-a, page 735), which is referred to and made a part hereof, purporting to be executed by the receiver and trustees under authority of the decree of April 16, 1875 under the so-called proceedings of 1875, was ultra vires, absolutely null and void and of no effect.

L.

That the deed from the said Frederick Billings to the Northern Pacific Railroad Company, dated December 16, 1876, Defendant's [807] Exhibit 35 (hearings before the Joint Congressional Committee, part 1-a, page 737), which is hereby referred to and made a part hereof, on parts of the property of the said railroad company and similar deeds of the same date between the same parties and other properties set out on page 738 of the hearings before the Joint Congressional Committee, part 1-a, which said deeds are seemingly in pursuance of the deed from Cass, receiver, and others to Billings, are all absolutely null and void, ultra vires and without authority and effect.

LI.

That the deeds in Defendant's Exhibit 36 (hearings before the Joint Congressional Committee, part 1-a, page 737) which are referred to and made a part hereof, were each and all absolutely null and void, ultra vires and without authority and effect, the said Defendant's Exhibit 36 being in the follownig words and figures:

"On the same date, December 16, 1876, there were also executed 9 other conveyances in precisely the same form by George W. Cass, receiver, and Jay Cooke and Charlemagne Tower, trustees, to Frederick Billings of lands as follows: 84,073.68 acres, Becker County, Minnesota, consideration $210,184.20; 147,694.73 acres, Otter Tail County, Minnesota, consideration $369,236.83; 99,926.57 acres, Wadena County, Minnesota, consideration $249,816.83; 17,958.37 acres, Polk County, Minnesota, consideration, $44,895.93; 199,565.02 acres, Clay County, Minnesota, consideration $498,912.55; 44,225.55 acres Todd County, Minnesota, consideration $110,563.87; 8,266.05 acres, Morrison County, Minnesota, consideration $20,665.13; 21,797.31 acres, Aitken County, Minnesota, consideration $54,493.28; 601.91 acres Cass County, Territory of Dakota, consideration $1,504.78."

LII.

That the deeds in Defendant's Exhibit 37 (hearings before the Joint Congressional Committee, part 1-a, page 738) which are referred to and made a part hereof, were each and all absolutely null and void, ultra vires and without authority and effect, the said Defendant's Exhibit 37 being in the following words and figures: [808]

"On the same date, December 16, 1876, there were also executed nine other conveyances in precisely the same form and for the considera-

tion of $1.00 in each instance by Frederick Billings to the Northern Pacific Railroad Company of lands as follows: 84,073.68 acres, Becker County, Minnesota; 147,694.73 acres, Otter Tail County, Minnesota; 99,926.57 acres, Wadena County, Minnesota; 17,958.37 acres, Polk County, Minnesota; 199,565.02 acres, Clay County, Minnesota; 44,225.55 acres, Todd County, Minnesota, 8266.05 acres, Morrison County, Minnesota; 21,797.31 acres, Aitken County, Minnesota; 601.91 acres, Cass County, Territory of Dakota."

LIII

That the deed from Johnson Livingstone and others purporting to be the committee of the bondholders of the Northern Pacific Railroad Company to the Northern Pacific Railroad Company, dated March 22, 1882, Plaintiff's Exhibit 50, Defendant's Exhibit 38 (hearings before the Joint Congressional Committee, part 1-a, pages 731-33) which is referred to and made a part hereof, is absolutely null and void, ultra vires and without authority so far as it is a deed conveying property, rights and franchises which had belonged to and would then still belong to the said railroad company and the only effect, if any, it had would be the termination of the so-called operating agreement of the said railroad system.

LIV

The decree of foreclosure in the proceedings of 1875, before there was any effort to execute it, was suspended and the Court never thereafter permitted

a sale under the foreclosure decree and there was no sale under the foreclosure decree of the lands of the railroad company.

LV

The Act of Congress of July 2, 1864 and the Joint Resolution of May 31, 1870 not only did not give authority to sell but in terms and effect prohibited any sale of the lands and property of the railroad company in foreclosure under the one and only mortgage permitted by the act and resolution to any party other than a Federal corporation, except the lands beyond the right of [809] way, which the act specifically provided for the sale of; this prohibition was for the purpose of preventing the right of way and the properties thereon, with necessary assets and franchises for the operation of same, from passing beyond the control of Congress by the right to amend and thus securing to the United States perpetually an ability to enforce its right for the transportation of the mail and troops and other privileges reserved to the United States under the Act of July 2, 1864 and the Joint Resolution of May 31, 1870; in Northern Pacific Railway Co. vs. Townsend, 190 U. S. 267; 47 L. Ed. 1044, the Court held that the right of way of the Northern Pacific Railroad Company could not be sold and conveyed by the railroad company, and in California vs. Central Pacific Railroad Company and others, 127 U. S. 1; 32 L. ed. 150, the Supreme Court held that a state could not tax a franchise of different railroad companies granted by Congress without the consent of Congress and the Court found as a

fact and stated, "That to facilitate the construction of said road the Government of the United States by said act of Congress adopted the defendant as the instrument or agent of the United States."

LVI

The Missouri Division mortgage of May 1, 1879, Exhibit G to the amended bill (printed exhibits Volume 1, page 30,) which is referred to and made a part hereof, the Pend d'Orielle Division mortgage of September 1, 1879, Exhibit H to the amended bill (printed exhibits Volume 1, page 47), which is hereby referred to and made a part hereof, General First Mortgage of January 1, 1881, Exhibit I to the amended bill (printed exhibits Volume 1, page 63) which is hereby referred to and made a part hereof, were all executed prior to the deed of March 22, 1882, defendant railway's exhibit 50, from the said so-called operating committee to the said railroad [810] company and if they are to be construed to be the acts and deeds of the said operating committee they in nowise affect the said railroad company or its property. They are inoperative and ineffective, not a lien upon the property, franchises or rights of the said railroad company. The General Second Mortgage of November 20, 1883, Exhibit J to the amended bill, page 87, the Third Mortgage of December 1, 1887, Exhibit K to the amended bill, page 109, and the consolidated mortgage of December 2, 1889, Exhibit L to the amended bill, page 130, and all other mortgages or bond issues that may be claimed to have been executed and

issued by the said railroad company are all absolutely invalid, null and void, inoperative and ineffective as to, and not a lien upon, any of the property, rights or franchises of the said railroad company, as they were mandatorily prohibited by the said Act of July 2, 1864 and the Joint Resolution of May 31, 1870, as those acts only permitted one mortgage and bonds thereunder and the mortgage of July 1, 1870 provided for sufficient money to complete the railroad system but stated the number of miles to be built and the amount allowed per mile, (2500 miles at $50,000 per mile) and the said mortgages were not permitted or consented to by the Congress; at the time of the execution of the said six mortgages and other mortgages or bond issues the officials of the said railroad company then in charge and control, and some or all of whom were in 1893 and 1896 in charge of said railway company, claimed and pleaded in Barne vs. Northern Pacific Railroad, 56 How. Pr. Reps. 23 (N. Y.), Wheeler vs. N. P. R. R. Co.; Eby vs. N. P. R. R. Co.; Villard vs. N. P. R. R Co. (JCC, pages 1634, 3140, 1984, 4365, and 3501) and other cases, and represented to the public, to the Congress (hearings before the Joint Congressional Committee, part 1, page 280) and to the trustees and bondholders under the said last mentioned mortgages, as this defendant railroad company and these minority stockholders are informed and believe, that the so-called foreclosure of 1875 was a legal and valid foreclosure and that all the property, assets, rights and franchises and franchises to be [811] a corporation of this said

defendant railroad company under the Act of July 2, 1864 and acts amendatory thereof, passed out of this said defendant railroad company and into another organization, syndicate or corporation and was thus relieved from the burdens and prohibitions as to executing and issuing of mortgages and bonds under the said Act of July 2, 1864 and the Joint Resolution of May 31, 1870; that the trustees and bondholders under the said last mentioned mortgages were aware of and took the said mortgages and bonds with knowledge of the foregoing acts and of the invalidity and illegality of the said mortgages and bonds and were not purchasers for value without notice; the validity of these mortgages was not only determined or upheld in the so-called foreclosure proceedings of 1896, but in that consolidated cause entitled the Farmers Loan and Trust Co., et als. vs. Northern Pacific Railroad Co., et als., the question of ultra vires and invalidity of the said mortgage having been raised, the Court in an opinion of April 13, 1899 (Government's Exhibit 58, sub. 47) on the petition of Sidney H. Salomon, refused to pass upon the question by stating, "There are other matters determined by the special masters—such as the question of ultra vires and of the validity of the mortgage—which were not necessary, I think, to the decision of the question involved and upon which I express no opinion."

The Court had previously, on April 27, 1896, in the so-called decree ordering a sale of the properties of the railroad company, (which will hereinafter

be shown as beyond the jurisdiction of the Court, ultra vires and invalid and void) reserved without passing upon the ultra vires and invalidity of these mortgages and also reserved without passing on the question of the jurisdiction of the Court in that cause, for the Court in the decree stated:

> "XXIX. It is further adjudged, ordered and decreed that all questions not hereby disposed of, including the discharge of the receivers and the settlement of their accounts, are hereby reserved for further adjudication."

[812]

The decrees of April 27 and 28, 1896 directing sales and the decree of July 27, 1896 confirming sales in terms resrved and did not decide or dispose of the petition pending then before the Court of the Wisconsin Central Railroad Company, Government's Exhibit 58, sub. 23, which is referred to and made a part hereof, which specifically raised the jurisdiction of the Court and the validity of the said last mentioned six mortgages; (JCC Pt. 3 P. sales in terms reserved and did not decide or dispose 1408-9-11-32-33) that the said questions of the jurisdiction and dealing with the validity of the mortgages were never determined by the Court and all the proceedings and decrees as to the foreclosure were by consent and collusion between the officials in charge and control of the railroad company and who were then or shortly thereafter, became officials in control of the said railway company and the bondholders and trustees, and the said decrees amounted to no more than collusive agreements which the Court had no jurisdiction or authority to

confirm, all of which will be more fully set out hereinafter and much of which is set out in the Government's Exhibit 58, of which there are 53 subdivisions or parts, which are referred to and made a part hereof.

That all proceedings in 1875 and 1896 are null and void on the face of the record, as the United States Government was not a party to either suit, notwithstanding it had an interest in the land and held the legal title to much of the land and it was a necessary party and there was no jurisdiction unless the United States was a party. Ribon v. Railroad Companies, 16 Wall. 446; 21 L. ed. 367, which held that there was no jurisdiction when a necessary party was not made a party.

The United States had and has an interest in the land and grants and the deeds and mortgage were required to be recorded in the Interior Department under the control of the United States and not in the various counties of the various states.

In the Land Grant Acts of July 1, 1898 (30 Stats. 597, 619, 620, 621) Congress carefully refrained from recognizing the railway [813] company as the lawful successor of the railroad company and expressly stipulated that the question be left open for future determination. (For statute see hearings JCC, part 1, pages 89-90)

LVII

The so-called corporation now claiming and contending to be the Northern Pacific Railway Com-

pany was incorporated as the Superior and St. Croix Railroad Company under a special act of the legislature of the State of Wisconsin approved on the 15th day of March, 1870 (hearings before the Joint Congressional Committee part 5, page 3019), which provided for and named 11 persons as incorporators, and the laws of Wisconsin as to corporations created and chartered under special acts, as well as corporations created and chartered under private acts, required a majority of the incorporators to be present at the organization meeting of the incorporators to make it a legal meeting, and the laws of Wisconsin as to corporations under special charters and under the general act required a majority of the stockholders to be present at all meetings to make them legal meetings; that six of the incorporators of the said Superior and St. Croix Railroad Company failed to attend and did not attend the first meeting held on February 4, 1871 or any of the meetings of the incorporators and stockholders and never more than 5 of the 11 incorporators ever met in any meeting of the incorporators; the said Superior and St. Croix Railroad Company was never legally organized and never functioned or operated as a legal corporation, all of which appears from the hearings of the Joint Congressional Committee in 14 parts and to some extent in part 6, pages 3511 to 3547 inclusive, but many statements therein are inaccurate and incorrect. There were some so-called meetings of the said directors and stockholders, all of which were illegal and unlawful but the meeting

held on August 31, 1880 was the last meeting held until October 8, 1895 to approve the act of Hiram Hayes, secretary, in [814] applying for and procuring the amendment of the charter, which was approved April 15, 1895, being Chapter 244 of the Private and Local Laws of 1895 (hearings of the Joint Congressional Committee, part 5, page 3026). This amendment of 1895 increased the powers and rights of the company beyond and above what was originally granted and in violation of the constitution of the State of Wisconsin; Section 9 of the charter of 1870 provided "and no business shall be transacted at any meeting of the stockholders unless a majority of the stock subscribed is represented." The amendment of 1895 changed it to read, "and no business shall be transacted at any meeting of the stockholders unless a majority of the stock subscribed and outstanding is represented."

This 1895 Amendment was such an increase of the powers, rights and functions that were forbidden by the constitution and denounced by the Supreme Court of Wisconsin in the case of Black River Improvement Company vs. Railway, 87 Wis. 584; 58 N. W. 126.

LVIII.

At a meeting of the stockholders of the Superior and St. Croix Railroad Company held July 1, 1896 a resolution was passed as follows:

> "Resolved, that the corporate name of this corporation be, and the same is hereby, changed from 'The Superior and St. Croix Railroad

Company' to 'Northern Pacific Railway Company' which latter name is hereby adopted as the corporate name of this corporation."

The entire minutes of this meeting are Plaintiff's Exhibit 1, which is hereby referred to and made a part hereof.

LIX.

After the above amendment of the legislature of April 15, 1895, the question arising as to whether or not the corporation was not dead and abandoned for non user and the amendment for that reason was invalid, the Superior and St. Croix Railroad Company had the Attorney General of Wisconsin file a friendly petition for a writ of quo warranto to see whether or not the [815] charter had been lost by abandonment, non user and failure to have meetings and whether or not it could be amended by a special act, as the constitution had been changed forbidding the incorporation of companies by special act. The petition was heard and decided by the Supreme Court in the case of Mylrea, Attorney General, vs. Superior and St. Croix Railroad Company, 93 Wis. 604; 67 N. W. 1138, in which the Court held on June 19, 1896 that the charter had not been abandoned by a failure to hold meetings or to carry on any work. The Court specifically refused to pass on the question of whether or not the amendment was not ultra vires and invalid and implications from its language are that the Court thought that the amendment of 1895 was invalid

and ultra vires because of the increased or added rights, powers and franchises, for the Court stated:

> "As to the increased or added rights, powers, and franchises under Chapter 244 (1895), the information does not allege that the defendant has used or exercised any of them. There is nothing to show that the company has done any act that it might not lawfully have done under its original charter. The information is the foundation of the jurisdiction of the court, and it cannot be aided by the very general and uncertain statement filed by the defendant that it 'is exercising and intends to exercise, the privileges, rights and franchises conferred upon it * * * by the amendatory act of 1895, and to acquire, by purchase, construction and otherwise, the railroads and general routes designated in that act, and to operate the same within and without the state, and to issue its stock and bonds thereon, as authorized by said act.' An information in the nature of quo warranto cannot be maintained against a corporation from what it may intend or threaten to do. This information does not present any actual practical question in these respects for the judgment of the court, and no judgment of exclusion could possibly be framed upon such allegations. For these reasons, the court cannot consider them, or enter upon the question of the validity of the act of 1895, referred to. The motion for leave to file an information and for process is denied."

At a meeting of the Board of Directors of the Superior and St. Croix Railroad held in New York July 8, 1896 the following resolutions were unanimously adopted:

> "Resolved, that the corporate name of this corporation be, and the same is hereby, changed from 'The Superior and St. Croix Railroad Company' to 'Northern Pacific Railway Company' which latter name is hereby adopted as the corporate name of this corporation."
>
> "Resolved, that the secretary of the corporation be and he is hereby instructed to file in the office of the Secretary of State of Wisconsin a copy of the foregoing resolution and of the [816] record of its adoption certified under his hand and the corporate seal of the corporation, and to publish a certified copy of said resolution for three successive weeks in the Wisconsin State Journal, the official state paper, as provided by Section 1835 of the Revised Statutes of Wisconsin for 1878."

The original charter of March 15, 1870 provided in Section 15 as follows:

> "Section 15. The capital stock of the company hereby created shall, in the first instance, be five millions of dollars, which capital stock may be increased to any sum not exceeding ten millions of dollars; the said capital stock to be divided into shares of $100.00 each."

This act of March 15, 1870 and the acts of January 20 1871, March 16, 1871 and April 15, 1895, being the charter and amendments of the Superior and St. Croix Railroad Company, are hereby referred to and each and every one of said acts is made a part hereof as if textually incorporated herein. (The acts are in part 5, pages 3019 to 3031 of the hearings of the Joint Congressional Committee.) The amendatory act of April 15, 1895 repealed the above section 15 fixing the capital and by its section 10 it amended section 11 of the original charter of 1870 as to the increase of its capital stock as follows:

"Sec. 10. Section 11 of said chapter 326 is hereby amended so as to read as follows:

"Sec. 11. The capital stock of said company may be increased from time to time to such an amount as may by its stockholders be deemed necessary for the construction, acquisition, or operation of any of its railroad or railroads, by a vote of the owners of record of at least a majority of all its outstanding stock, in person or by proxy, at any annual meeting, or at any meeting called for that purpose, by a notice in writing to each stockholder, to be served upon him personally, or by depositing the same in the post office postage paid, properly directed to him at the post office nearest his usual place of residence, at least 20 days prior to such meeting. Such notice shall state the time and place of such meeting, its object and the amount to

which it is proposed to increase such capital stock. No vote in favor of such increase shall take effect until the proceedings of such meeting, showing the names of the stockholders voting therefor, and the amount of stock owned by each, shall be entered upon the records of said corporation, and the said company may at any such time, by a vote of the holders of record of two-thirds of said outstanding stock, classify its said stock into common and preferred; and it may further classify its said stock by dividing its preferred into different classes and it may make any or all of said classes of preferred stock cumulative or noncumulative as to dividends thereon, and any or all of said preferred stock may be with or without preference over any other stock or classes of stock in the event of the liquidation of the company's affairs, either through insolvency or otherwise. And the said company may make such preferred stock convertible into common stock upon such terms and conditions as may be fixed by the board of directors. [817]

The amended act added Sections 14, 15 and 16 as follows:

"Sec. 14. The said company shall, in addition to the special powers, conferred upon it by said chapter 326, and by this act, have, possess, and enjoy all of the rights, powers, privileges, and immunities conferred upon railroad corpo-

rations by chapter 87, of the Revised Statutes of 1878, and the acts amendatory thereof and supplementary thereto, and shall be subject, save where inconsistent herewith, to the restrictions, duties and liabilities imposed upon railroad corporations by said chapter, and all amendatory and supplementary acts.

"Sec. 15. Sections 13, 14, 15 16, 17, 18 and 19 of said chapter 326 are hereby repealed.

"Sec. 16. All acts and parts of acts inconsistent with, or in any manner contravening, the provisions of this act are hereby repealed."

These amendments granted, as the Court in the Mylrea case stated, "The increased or added rights, powers and franchises," which are unconstitutional, invalid and void; such increase or added powers cannot be granted as an amendment to a charter by special act of the legislature, as determined by the Supreme Court of Wisconsin in Black River Improvement Company vs. Halway, 87 Wis. 584; 59 N. W. 126, which held that the constitution of 1871 limited the power to amend to extend the life of the corporation but there could not be an amendment which increased the rights and powers of the corporation.

The capital stock of the company was increased to $155,000,000 at the meeting of the stockholders held July 1, 1896 in an attorney's office in Madison, Wisconsin (see minutes, Plaintiff's Exhibit 1), which was absolutely ultra vires, null and void as

it was not authorized by the original charter and it could not, under the constitution, be authorized by an amendment, and it was not in compliance with the amended section, even if the amended statute were valid, which is denied.

So-called directors meetings of the defendant railway company were held in various offices of various parties and hotels in various towns in the States of Washington, New York, Wisconsin and Minnesota as shown by Plaintiff's Exhibits 3 to 17, both inclusive, 20 to 22 both inclusive, 24 to 27, both inclusive, all of which are referred to and [818] made a part hereof, all of which meetings and all other meetings of stockholders and directors of the said railway company were unlawful, illegal, null and void and of no effect as shown by various exhibits and allegations of this answer and cross bill.

At the so-called meeting of the stockholders July 1, 1896 (Government's Exhibit 1) there were only 43 shares of the stock present at the meeting and they were all voted by the said John C. Spooner, A. L. Sanborn, (who was a law partner of Spooner and an attorney for the railroad company and receiver of the railroad company) and H. C. Reed under proxies. The 3800 shares of the outstanding stock at that time owned by the defendant railroad company and in the possession of its attorney, the said John C. Spooner, was not voted. The record does not show that it was present and there was no notice to the railroad company or its receiver.

The said minutes of said meeting (Government's Exhibit 1) show that the whole meeting was illegal, unlawful, null and void and contrary to and in violation of the original charter and, if the amended charter was valid, it was contrary to and in violation of said amended charter. [819]

The original charter of March 15, 1870 only authorized the building of a railroad from a point on the west shore of the Bay of Superior or the south shore of the Bay of St. Louis in Douglas County, Wisconsin, through several other counties, to a certain point on the Minensota boundary north of the Nemadji River as might be deemed advisable, which was purely an intrastate road. The so-called amendment of April 15, 1895 authorized the building of a road not only as set out in the original charter but to build it to points in Michigan and on to the Pacific Coast and to St. Paul, Minnesota and Chicago, Illinois, thus making it an inter-state railroad.

This was such an increase of the powers, rights and functions as were forbidden by the constitution and denounced by the Supreme Court of Wisconsin in the case of Black River Improvement Company vs. Halway, 87 Wis. 584; 59 N. W. 126.

LX

At the time of the meeting of the stockholders of said railway company on August 31, 1880, at which directors were elected, this defendant railroad company was the owner of and there was outstanding

in its name 3800 shares of the 3844 shares of outstanding stock of the said railway company, and at the meeting of August 31, 1880 the 3800 shares were voted and 12 other shares were voted, the other 32 not being voted.

At the meeting of July 1, 1896 the 3800 shares of the stock of the railway company belonging to the railroad company were in the custody and possession of John C. Spooner, who took part in said meeting, who was attorney for the said railroad company and for the receiver of the said railroad company and who had received the stock as such attorney from the First National Bank of Madison, Wisconsin on May 23, 1895, for and on behalf of the said railroad company, being certificates Nos. 20, 21, 22, 23, 24 and 25 for 500 shares each and No. 26 for 800 shares, which said certificates of stock were issued by the [820] Superior and St. Croix Railroad Company on July 29, 1873 to the Northern Pacific Railroad Company. The remaining 44 shares of stock of the Superior and St. Croix Railroad Company, which was afterwards changed to the Northern Pacific Railway Company, was bought up by officers and officials of the railroad company with its funds and for its benefit and at the said so-called stockholders meeting of the railway company of July 1, 1896 the railroad company was the owner of all of the stock of the said railway company, and at such meeting officers and officials of the railroad company were elected officers and officials of the railway company.

The foregoing action of the officials of the railroad and railway companies in voting the stock of the railway company, which was owned by the railroad company, was illegal, unlawful and condemned by the principles decided in the case of Wardell vs. Union Pacific Railroad, 103 U. S. 651; 26 L. ed. 509.

LXI

The decisions of the three Federal Courts in the Boyd case (hearings before JCC, part 6, page 3182, 3205 and 3220) being Boyd vs. Northern Pacific Railway Co., 170 Fed. 799 (C. C.), Northern Pacific Railway Company vs. Boyd, 177 Fed. 804 (C. C. A.) and Northern Pacific Railway Company vs. Boyd, 228 U. S. 482, stated and set forth most of the facts and proceedings in the so-called 1896 reorganization or so-called foreclosure proceedings of the railroad company and those cases held that the foreclosure suit was a collusive and fraudulent consent decree and that the decision in Paton vs. Northern Pacific Railroad Company, 85 Fed. 838 (C. C.) was not res judicata and was not a controlling authority because of the principles declared in C. R. I. & P. R. R. Co. vs. Howard, 7 Wall. 391; Louisville Trust Co. vs. Louisville R. R., 174 U. S. 674. While the Supreme Court stated that all the facts in the Paton case were not before the Court, yet it decided as it did; [821] the Court could have stated that the Circuit Court in the Paton case refused to take jurisdiction of the bill because it sought to have the Court make a new reorganization contract, and

further because Paton, as a creditor, was seeking to be put in the position to take the place of stockholders and yet did not offer to refund to the stockholders the $10.00 per share that they had deposited on their stock. The opinions in the three Boyd cases are referred to and made a part hereof.

The 1896 foreclosure was started by stockholders filing a creditors' bill on August 16, 1893 and the Farmers Loan and Trust Company filing a foreclosure bill on October 18, 1893, and there were other suits filed, all of which were afterwards consolidated and became known as the foreclosure proceedings of 1896, most of the proceedings in which are set forth in the Government's Exhibit 58, being in some 53 parts, and the final decree of which is Defendant's Exhibit 46. As hereinelsewhere alleged, the United States Circuit Court for the Eastern District of Wisconsin did not have jurisdiction of the parties or of the subject matter or of the property of some of the mortgages or of the United States, and the decrees and proceedings therein are absolutely null and void, ultra vires and beyond the power and jurisdiction of the Court, and when such powers and jurisdictions were raised in the suit, the Court refrained from deciding same and they have never to this day been decided in that suit, or elsewhere.

The so-called decrees of foreclosure and sale in the said consolidated suit were contrary to, in violation of, and prohibited by the Act of July 1, 1864 and the Joint Resolution of May 31, 1870 and acts amendatory thereof, and the said decrees are abso-

lutely null and void and beyond the jurisdiction and power of the Court and the same appears on the face of the record. The decisions in the Boyd case state that there was no actual foreclosure sale.

[822]

On October 15, 1896 the Northern Pacific Railroad Company executed a deed to the so-called Northern Pacific Railway Company conveying all its land grants, properties and assets, in which deed it is stated that the decrees of April 27, 1896 and April 28, 1896 ordered "that unless the defendant Northern Pacific Railroad Company should make all the payments directed in Article 20 of said decree within the time limited, all the lands granted by Congress to aid in the construction equipment of the said railroad of the said defendant Northern Pacific Railroad Company, and all rights of said Northern Pacific Railroad Company under the said land grants made to it by Congress, except such lands as lie within the State of Minnesota and the State of North Dakota east of the Missouri River," should be sold.

Then, after reciting the sales and confirmation thereof on August 18, 1896, the deed recites:

> "Whereas in and by the said decrees of confirmation it was further ordered by way of further issuance and confirmation of title to the said purchases, the Northern Pacific Railroad Company, mortgagor, and the Farmers Loan and Trust Company, mortgagee, each by its proper officers and under its corporate seal,

should upon the request of such purchaser, Northern Pacific Railway Company, sign, seal, execute, acknowledge and deliver to such purchaser, or to its successors or assigns, all proper deeds of conveyance, transfer, release, further assurance of all the railroad property and franchises so, as aforesaid, sold under the decree of such court, and embraced in the deed of the special Masters, so as fully and completely to transfer to, and invest in, the said purchaser, and in its successors and assigns, the full legal and equitable title to all such railroad property and franchises sold and intended to be sold as aforesaid, and

"Whereas the board of directors of the Northern Pacific Railroad Company, party of the first part hereto, had duly resolved and directed that the deed be made, executed and delivered by the said corporation to the said Northern Pacific Railway Company

"Now, therefore, this indenture witnesseth, that the said party of the first part hereunto, pursuant to the authority and direction to it in said judgment and decree contained as hereinbefore recited, and also in pursuance of the resolution of the board of directors as aforesaid * * *"

This deed was acknowledged in New York in ten original copies on the same date, October 15, 1896; this deed and the decree recited therein are absolutely null and void and beyond the jurisdiction and

power of the Court to require or order and there was no pleading in [823] the cause to justify same or on which same could be based; the said deed is absolutely null and void as a deed and act of the said railroad company and was in violation of and prohibited by the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 and acts amendatory thereof. as held by the Supreme Court in Northern Pacific Railway Company vs. Townsend, 190 U. S. 267. This deed is set out in full in hearings before the Joint Congressional Committee, part 1, pages 623 through 635. [824]

LXII

By a so-called decree of September 16, 1899 in the said consolidated foreclosure proceedings of 1896, it was provided in part as follows:

> "It is further ordered and decreed that by way of further assurance and confirmation of title to such purchaser, the said Northern Pacific Railroad Company, by its proper officers and under its corporate seal, shall sign, seal, execute, acknowledge and deliver to said purchaser or its successors or assigns, its deed or deeds of conveyance, assignment, transfer, release and further assurance of all the said lands and rights sold to said purchaser." (hearings before JCC, part 3, page 1480.)

This decree and the above portion thereof were beyond the power and jurisdiction of the Court, and furthermore, there was no allegation in any of the

pleadings in the cause on which to base such an order, and the decree and the above portion thereof and the deed executed by the railroad company thereunder to the railway company are both illegal, null and void, as prohibited by the act of July 2, 1864 and the Joint Resolution of May 31, 1870 and acts amendatory thereof, as held by the Supreme Court in Northern Pacific Railway Company vs. Townsend, 190 U. S. 267; 47 L. ed. 1044, in which the railway company herein was the same railway company therein and was under the above statutes. The parties to the said foreclosure proceedings of 1896 had, during the three years prior to this decree of September 16, 1899, come to a realization that the Court proceedings and other transactions were all illegal, null and void and that then, in a desperate effort to try to make the transaction carry water, they had the above invalid and void decree entered and the invalid and void deed executed—the said railroad company being then in captivity to the said railway company, as its officers and officials had forsaken the railroad company and in violation of their duties permitted the said decree and deed to be entered and executed. A deed from the railroad company to the so-called railway company was executed October 15. 1896 (JCC, Pt. 1, p. 624) reciting it was authorized by decree of April 27 (see XXVI) and 28 (see IV, JCC. 1409-11) 1896 and confirmation of sales decree of August 8, 1896 required such a deed (JCC. 1441) all of which was illegal and beyond the jurisdiction of the Court.

[825]

LXIII

It was never the intention of the officials of the Northern Pacific Railroad Company and of the so-called Northern Pacific Railway Company to make a bona fide sale of the land, property and franchises of the railroad company in the 1896 reorganization and foreclosure, as the reorganization agreement of March 16, 1896 set out at page 2846 of the hearings before the JCC, (Plaintiff's Exhibit M to the amended bill, printed exhibits Volume 1, page 163) to which reference is made and it is made a part hereof, provided at page 2847 that the old agreement of February 19, 1894, printed exhibits Volume 1, page 166) was adopted into and made a part of the agreement of March 16, 1896 and it provided among other things, page 2849, that the reorganization managers could

> "do whatever, in the judgment of the managers, may be necessary to promote or to procure the sale as an entirety or the joint or separate sales of any lands, grants of lands, property, or franchise herein concerned, wherever situated; to adjourn any sale of any property or franchise, or of any portion or lot thereof at discretion; to bid or to refrain from bidding at any sale, either public or private, either in separate lots or as a whole, for any property or franchises or any part thereof, whether or not owned, controlled or covered by any deposited security or by the bonds represented by any assenting certificate, including or excluding any particular

rolling stock or other property, real or personal, and at, before, or after any sale to arrange and agree for the resale of any portion of the property which they may decide to sell rather than to retain; to hold any property or franchises purchased by them, either in their name or in the name of persons or corporations by them chosen for the purposes of this agreement, and to apply any security embraced hereunder in satisfaction of any bid or toward obtaining funds for the satisfaction thereof; and the term property and franchise shall include any and all railroads, railroad and other transportation lines, branches, leaseholds, lands, rights in lands, mining rights, stocks, or other interests in corporations, in which the railroad company has any interest of any kind whatever, direct or indirect. The amount to be bid or paid by the managers for any property or franchises shall be absolutely discretionary with them; and in case of the sale to others of any property or franchises the managers may receive out of the proceeds of such sale or otherwise any dividend in any form accruing on any securities held by them."

At the invalid so-called meeting of the stockholders of the railway company on July 1, 1896, upon the motion of John C. Spooner it was stated that

[826]

"Whereas under the reorganization plan of March 16, 1896, Morgan & Co. hold securities

of the Northern Pacific Railroad, which they propose to use in the purchase of the railroad, franchises, and property at the sales under the foreclosure decrees or upon the request of the Northern Pacific Railway Co. in exchange for its capital stock and bonds to transfer the Northern Pacific Railroad securities to the Northern Pacific Railway Co. to enable the Northern Pacific Railway Co. to purchase at the foreclosure sale the rights, property and franchises of the Northern Pacific Railroad Co., it was resolved that the Northern Pacific Railway Co. to enter into contracts with J. P. Morgan & Co. reorganization manager, for the securities of the Northern Pacific Railroad and use these securities to purchase the railroad property and franchises of the Northern Pacific Railroad Co., and that the president and secretary of the company were authorized to attend the judicial sales and bid in the Northern Pacific Railroad property to the extent of the securities of the railroad company then controlled by the railway company, and in payment therefor to transfer and deliver any or all of the stocks, bonds, or other securities of the Northern Pacific Railroad Co."

The above contract and proceedings and the contract of July 13, 1896 (Plaintiff's Exhibit N, printed volume 1, page 189) between the railway company and Morgan and Co., in which it was stated that the railway company intended to acquire

the railroad company property and franchises, including the grant of the Northern Pacific Railroad Company under the said foreclosure decree, were prior to the mock foreclosure sale.

LXIV

That the so-called requirement of the said so-called railway company, which it is hereinbefore alleged is not a corporation, that these and other minority stockholders of the said railroad company turn in their stock and pay $10.00 per share and in return therefor receive stock of the said so-called railway company and these and other preferred stockholders of the said railroad company turn in their stock and pay $15.00 per share therefor, was without any consideration, and was illegal, unlawful, invalid and void and part of the scheme to defraud these minority stockholders and others similarly situated. That there was no power in the said so-called railway company or the Court or the said railroad company to force these minority stockholders and others similarly situated to make such deposit and to take stock of the said so-called railway company, and it was not [827] the intention of the parties to the various so-called reorganization agreements of 1894 and 1896 to forfeit the rights of those minority stockholders and others similarly situated in their stock in the said railroad company or their share of the assets and properties of the said railroad company or to the preferred stockholders' rights to have their preferred stock paid out of the sales

of certain land, nor was it the intention of the said parties to the said reorganization agreements to enforce the so-called time limit and the said so-called time limit was not enforced but was waived and long after the expiration of the said so-called time limit the parties to the said agreement sought to persuade the minority stockholders to come into the agreement and put their stock in; that the officers and officials, which terms include the directors. of the so-called railway company, as herein elsewhere described and alleged, unlawfully and illegally seized and took possession of all of the property, assets, franchises and rights of the said railroad company in 1896 and have held them ever since.

That these minority stockholders and others similarly situated are entitled to their pro rata interest in all the properties, lands, land grants, leases, notes, bonds, stock, monies and all other assets of the Northern Pacific Railroad Company owned and possessed by the Northern Pacific Railroad Company in 1875 and in 1896 and all of same which have been seized, grabbed, collected. taken possession of and held by the said so-called railway company from 1896 to this date, whether or not held by the said so-called railway company in its own name or whether put into the names of other corporations and individuals for its benefit, the stock and notes of such corporations and individuals being held and retained by the said so-called railway company; that copies of the common stock certificates and preferred stock certificates similar to those held

by these minority stockholders were filled in this cause as Government Exhibits 29 and 30, to which reference is made and same are made a part hereof.

[828]

LXV

That on numerous occasions and at practically every annual meeting since 1899 of the said railroad company, these minority stockholders and others similarly situated and cooperating with them have made efforts to have the said railroad company take steps to protect the said railroad company and its stockholders and recover back from the said railway company, its successors, assignees and subsidiaries, all of the property, lands, land grants, leases, stocks, bonds, notes, monies and assets belonging to it which were seized and taken possession of and held by the said so-called railway company, its successors, assignees and subsidiaries; there are in the record as exhibits minutes of many meetings of the said railroad company which are referred to and made a part hereof, and which show efforts of such minority stockholders to have righted and corrected and to overcome the above described actions and proceedings had and taken by the said officials of the said so-called railway company who are officials of and have seized and taken possession of and held the said railroad company in captivity and thwarted and prevented all such efforts of minority stockholders to obtain such relief, which acts on the part of the said officials and officers of the said railroad company are illegal and unlawful.

LXVI

That in this cause the said officials and officers of the said so-called railway company illegally and unlawfully had the attorneys for the said so-called railway company, namely, Grafton Mason, E. J. Cannon, D. F. Lyons and D. R. Frost, who filed pleadings for the said so-called railway company, to file certain so-called pleadings claiming to be on behalf of and as the pleadings of this said railroad company, being the Northern Pacific Railroad Company, and sign the same as solicitors for the Northern Pacific Railroad Company, one of which pleadings so filed in this cause on January 18, 1932, was entitled and is as follows: [829]

"DISCLAIMER OF NORTHERN PACIFIC RAILROAD COMPANY

Defendant Northern Pacific Railroad Company, a corporation, organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365) says that it does not claim or pretend to have any right, title or interest in the subject matter of this suit as set forth in the original bill of complaint as amended, or any part thereof, and this defendant disclaims any right, title or interest in said subject matter and every part thereof.

Wherefore this defendant prays that the original bill of complaint as amended be dismissed as to it."

The other such pleading was filed May 9, 1932 and was entitled and is as follows:

> "ANSWER OF DEFENDANT NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION
>
> Now comes the defendant Northern Pacific Railroad Company, a corporation, and for its answer to the bill of complaint says:
>
> It admits that it is a federal corporation, organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365), and has an office in the City of New York. Denies that it is engaged in business.
>
> Defendant abides by, adopts and makes a part of this answer the amended and supplemental answer filed herein by defendant Northern Pacific Railway Company."

The filing of the said two above Court pleadings by the said so-called railway company through its own solicitors claiming to be on behalf of the said railroad company was part of the illegal and unlawful schemes and plans of the said so-called railway company to maintain its captivity and seizure of the said railroad company in fraud of the minority stockholders of the said railroad company and especially of the minority stockholders herein and those cooperating with them, and the said pleadings are of no effect and are absolutely null and void, and without any authority of the directors or stockholders of said railroad company.

LXVII.

That all of the stock, notes and bonds of the Northwestern Improvement Company held by the said railway company or its successors, assigns or subsidiaries and all lands under the grants of the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 taken in the name of the said Northwestern Improvement Company and all the notes, stocks or bonds of other corporations or [830] individuals which are assignees, successors or subsidiaries of the said railway company and all lands under the land grants of the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 received and taken in the name of the so-called railway company or any of such assignees, successors or subsidiaries are the lands and properties and belong to and the title actually is in or should be in the name of this said defendant Northern Pacific Railroad Company. Whatever title or possession is held otherwise is illegal and unlawful and is for the use and benefit of the said Northern Pacific Railroad Company.

Wherefore, this defendant Northern Pacific Railroad Company and these minority stockholders on behalf of said Northern Pacific Railroad Company and themselves and all others similarly situated pray:

(a) That the Court find, declare, and decree that the grants made to this defendant Northern Pacific Railroad Company by the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 were and are

deficient to the extent and at the times alleged in the answer and cross bill as well as in the answer of the so-called Northern Pacific Railway Company and that the Court determine the compensation due to this defendant, the Northern Pacific Railroad Company for the lands expropriated by the United States by the Act of June 25, 1929 and enter its decree in favor of this defendant Northern Pacific Railroad Company for the sums so found together with interest thereon from the 25th day of June, 1929 and that nothing be found due to the said so-called Northern Pacific Railway Company.

(b) That the Court find, declare and decree that title to all lands granted, grantable, patented, and patentable, under the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 is vested by virtue of said acts in this defendant Northern Pacific Railroad Company and in no other company, corporation, association [831] or individual and that no part or portion of same has passed to any other company, corporation, association or individual except the sales by this defendant railroad company to homestead exemptors.

(c) That the Court find, declare and decree that any so-called title, deed, patent or claim in and to any of such lands described in the preceding prayer as may have passed to the said Northern Pacific Railway Company or any other company, corporation, association or individual except homestead exemptors be declared to have so passed illegally and unlawfully and in violation of the statute and

that any deeds, conveyances or patents to such extent be cancelled and declared null and void and title to same be found, declared and decreed to be in said railroad company.

(d) That the Court find, declare and decree that any and all patents issued by the United States for lands granted and patentable under the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 to any company, corporation, association or individual other than this defendant Northern Pacific Railroad Company be declared illegal and unlawful, null and void and be cancelled and that the United States be required to issue a new patent covering and including all of such lands to this defendant Northern Pacific Railroad Company.

(e) That this Court find, declare and decree that no title right of possession or ownership passed out of this defendant Northern Pacific Railroad Company by the so-called foreclosure proceedings and the reorganization proceedings of 1875.

(f) That the Court find, declare and decree that no title, right of possession or ownership to any of the lands granted, grantable and patentable under the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 whether or not theretofore or thereafter patented or still patentable, passed out of this said defendant Northern Pacific Railroad Company by the so-called foreclosure proceedings and reorganization of 1896, and further [832] that the Court find, declare and decree that title to all such lands was and is in the said Northern Pacific Railroad

Company and that it is entitled to possession thereof, and possession thereof be decreed to said Northern Pacific Railroad Company.

(g) That the Court find, declare and decree that title and ownership and right to possession of any and all of the lands, buildings, property, leases, stock, bonds, notes and monies held and owned by the said Northern Pacific Railroad Company and to which it was entitled in 1875 and 1896 did not pass out of and has not passed out of the said Northern Pacific Railroad Company by and on account of the foreclosure proceedings and reorganization of 1875 and foreclosure proceedings and reorganization of 1896 or any other proceedings or contracts, and be it further found, declared and decreed that the said Northern Pacific Railroad Company has title to and ownership of and is entitled to possession of and that possession be decreed and ordered given to the said Northern Pacific Railroad Company of all of such lands, buildings, property, leases, stock, bonds, notes and monies and of all such lands, buildings, properties, leases, stock, bonds, notes and monies which have passed to, been received, seized, grabbed, or taken possession of, by the said Northern Pacific Railway Company or any or all of its successors, assignees or subsidiaries and that such mandatory orders and injunctions be granted and issued as may be necessary to enforce such return of the possession and custody of same to the said Northern Pacific Railroad Company.

(h) That the Court find, declare and decree that the $125,000,000 of bonds secured by and issued under the mortgage of July 1, 1870, which were retired into the treasury as a trust fund and for the benefit and protection of the preferred stockholders and thereafter the common stockholders who took such stock for debts owing by the Northern Pacific Railroad Company, are now, [833] and have at all times since their transfer into the said treasury, been treasury bonds subject to the aforesaid rights of the preferred and common stockholders still unsatisfied and unpaid and the first and only lien on the lands, franchises, rights and properties described in the said mortgage of July 1, 1870.

(i) That the Court find, declare and decree that, with the exception of the mortgage of July 1, 1870, all mortgages, deeds of trust or other liens, as well as any bonds, notes or obligations secured thereby, executed by the said Northern Pacific Railroad Company on the property described in same, being the said Northern Pacific Railroad System described in the bill, to be absolutely null and void, of no effect and not a lien on any property described therein or on any property of the said Northern Pacific Railroad Company.

(j) That the Court find, declare and decree that all mortgages, trusts, or liens and the bonds, notes or obligations secured thereby issued by the so-called Northern Pacific Railway Company since June 30, 1896 not to be a lien on or to in any way encumber or affect any of the property of the said

Northern Pacific Railroad Company, which same purported to cover and include and purported to be the property of the Northern Pacific Railway Company, and further not to be any obligation whatever of the said Northern Pacific Railroad Company.

(k) That the Court find, declare and decree that the said Northern Pacific Railroad Company be released from the captivity thereof by the said railway company, as alleged in the answer and cross bill, and that a stockholders meeting of the said Northern Pacific Railroad Company be ordered to be held for the election of officers and directors, and that at such meeting no officer, director or stockholder of the said so-called Northern Pacific [834] Railway Company shall be elected an official or director of the said Northern Pacific Railroad Company; and further that the said Northern Pacific Railroad Company and its stockholders be restored to all their rights and privileges, free from any dominance of the said so-called railway company.

(l) That the plaintiff and all other defendants in this cause be required to answer this cross bill of the Northern Pacific Railroad Company but not under oath, as answer under oath is expressly waived.

(m) That the Court find, declare and decree all other further and general relief to the said Northern Pacific Railroad Company as its cause may require and to equity may seem just and proper, in-

cluding counsel fees and costs. And it will ever pray.

NORTHERN PACIFIC RAILROAD COMPANY,
By CHARLES E. SCHMIDT,
GEORGE LANDELL,
Executor of E. A. Landell.
CLARENCE LOBENTHAL,
Trustee of Bernard Lobenthal.
WALTER L. HAEHNLEN.

THOMAS BOYLAN,
Liberty Trust Building,
Philadelphia, Pennsylvania.
ROBERT L. EDMISTON,
Title Building,
Spokane, Washington.
RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,
Peoples Life Insurance Bldg.,
Washington, D. C.,
Solicitors for the Minority Stockholders on behalf of Northern Pacific Railroad Company. [835]

State of Pennsylvania,
County of Philadelphia—ss:

I, Walter L. Haehnlen, being first duly sworn, depose and state that I am one of the minority stockholders of the Northern Pacific Railroad Company who are filing the foregoing answer and cross bill

of the Northern Pacific Railroad Company on its behalf, and I have read the said answer and cross bill and the facts stated therein are true to the best of my knowledge, information and belief.

WALTER L. HAEHNLEN.

Subscribed and sworn to before me and given under my hand and seal this 30th day of August, 1937. My commission expires the 7th day of March, 1939.

(Notarial Seal) ANNA B. RENSHAW,
Notary Public for County of Philadelphia,
State of Pennsylvania.

One copy rec'd this 3rd day of Sept. 1937.

J. M. SIMPSON,
U. S. Atty.
F. J. McKEVITT,
By J. L. THOMAS.

[Endorsed]: Filed Sept. 3, 1937. [836]

[Title of District Court and Cause.]

MOTION TO STRIKE ANSWER AND CROSS BILL

Comes now the plaintiff above named and moves the Court for an order striking from the records herein the Answer and Cross Bill of the Northern Pacific Railroad Company by Charles E. Schmidt and other Minority Stockholders of said Railroad Company on the ground that no leave of Court had

been asked or obtained for filing said Answer and Cross Bill under rule 21 of the rules of this Court;

The plaintiff further moves the Court for an order dismissing said Answer and Cross Bill of the Northern Pacific Railroad Company by Charles E. Schmidt and other Minority Stockholders of said Railroad Company on the ground that said Cross Bill does not state cause of action against the United States. [837]

This motion is based upon the records and files herein.

Dated this 13th day of September, 1937.

J. M. SIMPSON
United States Attorney for the
Eastern District of Washington
Of Attorneys for Plaintiff.

Copy received this 13th day of September, 1937.

ROBERT L. EDMISTON
Of Attorneys for the Minority
Stockholders on behalf of Northern Pacific Railroad Company
Of Attorneys for Defendants.

[Endorsed]: Filed Sept. 13, 1937. [838]

[Title of District Court and Cause.]

MOTION TO STRIKE ANSWER AND CROSS BILL OF THE NORTHERN PACIFIC RAILROAD COMPANY BY CHARLES E. SCHMIDT AND OTHER MINORITY STOCKHOLDERS OF SAID RAILROAD COMPANY.

The defendants Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company, move the Court for an Order striking the so-called answer and cross-bill of Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders of said Railroad Company, filed and served in this cause on the 3rd day of September, 1937, on the following grounds:

I.

The Northern Pacific Railroad Company has long since filed its answer in this cause by D. F. Lyons and others who were duly authorized attorneys of the said Northern Pacific Railroad Company, and D. F. Lyons has been succeeded as attorney for said Railroad Company in this cause by L. B. [839] daPonte whose appearance has heretofore been duly entered therein. Said L. B. daPonte, D. R. Frost, and F. J. McKevitt, who succeeded E. J. Cannon, are and were at the time said pretended answer and cross-bill of said Railroad Company was filed, the duly authorized attorneys of record for said Railroad Company, pursuant to Rule 4 of this Court, and

said Charles E. Schmidt and others, said to be minority stockholders of the said Railroad Company, do not have the authority of said Railroad Company, or any authority whatsoever, to file any answer, cross-bill, or other pleading in this cause in behalf of said Railroad Company.

II.

Neither Thomas Boylan and others purporting to sign said answer and cross-bill as solicitors for the minority stockholders on behalf of said Northern Pacific Railroad Company, nor said individual stockholders have been substituted as attorneys for said Railroad Company as required by the last paragraph of Rule 4 of this Court; nor have said parties or any of them applied to this Court for leave to substitute said pretended answer and cross-bill for the answer heretofore filed on behalf of said Northern Pacific Railroad Company by its duly authorized attorneys.

III.

Insofar as the so-called answer and cross-bill filed by said Charles F. Schmidt and others claiming to be minority stockholders is in their own names and in their own behalf, said parties may appear in this cause only after complaint in intervention has been duly noticed and allowed under an order of this Court under Equity Rule 37. No notice of petition for leave to intervene has been filed, and no order permitting intervention has either been asked by said Schmidt and the others, or made by this Court.

[840]

IV.

Insofar as said document purports to present a cross-bill of said Northern Pacific Railroad Company or said Schmidt and others, the same has not been filed within the time fixed by Rule 21 of the Rules of Practice of Federal Court, Ninth Judicial District, which provides as follows:

> "A cross-bill may be filed after the taking of evidence has commenced on leave of Court on such terms and conditions as may be just."

The taking of evidence in this case has commenced and has been completed with respect to defendants' motions directed to the bill of complaint and with respect to the adjustment of the grant, and the Master has made his report, and this case is now ready for argument and will be set for argument in this Court on exceptions to the said Master's report on the adjustment of the grant, all of which appears from the record in this cause.

Insofar as, if at all, said so-called answer is to be taken as an answer on behalf of said Schmidt and others as minority stockholders, it comes too late to entitle said parties to intervene or to open up the evidence or otherwise take part in this cause.

V.

Insofar as said cross-bill presents issues between the Northern Pacific Railway Company and the Northern Pacific Railroad Company and said Schmidt and others, which are not germane, nor in

any way related to the subject matter of the complaint or to the issues to be determined in this cause between plaintiff and all of said defendants, said issues can not be asserted in this cause by said purported cross-bill.

Without waiving their motion to strike the so-called answer and cross-bill filed herein September 3, 1937, and in the event only that said motion be overruled, defendants move that said parties claiming to be minority stockholders, namely [841] Charles E. Schmidt, George Landell, Clarence Loebenthal, and Walter L. Haehnlen, not being residents of this district, but residents of the State *of* Pennsylvania, be required to give security for costs in accordance with Rule 76 of the rules of this court.

L. B. daPONTE,
D. R. FROST,
F. J. McKEVITT,
Solicitors for Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company.

Service acknowledged by a receipt of a true and correct copy this 15th day of Sept. 1937.

ROBERT L. EDMISTON,
Of Attorneys for N. P. Railroad.

[Endorsed]: Filed Sept. 15, 1937. [842]

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE INTERVENING PETITION

Now come Walter L. Haehnlen and others and move the Court to grant them leave to file their intervening petition, the original of which is hereto attached, copies of same having been served on counsel for the various parties.

THOMAS BOYLAN
ROBERT L. EDMISTON
HUDSON & HUDSON
By RAYMOND M. HUDSON
Attorneys for Petitioners

Copy of Notice and Petition received Jan. 31/38.
SAM M. DRIVER
U. S. Attorney
By M. SNYDER

Service accepted Jan. 31, 1938.
F. J. McKEVITT
As Atty for three defts. last above named

NOTICE

To J. C. Biggs, Esq., E. E. Danley, Esq., Walter Pope, Esq., Sam M. Driver, Esq., Attorneys for the United States; L. B. daPonte, Esq., D. R. Frost, Esq., F. J. McKevitt, Esq., Attorneys for Defendants:

Take notice that the above motion and the petition attached thereto will be lodged with the Clerk

in due course of mail and will be presented to the Court on the day that the Court hears the motions of defendants and plaintiff to strike out the answer of the Northern Pacific Railroad Company filed by these petitioners.

HUDSON & HUDSON
By RAYMOND M. HUDSON
Attorneys for Petitioners [843]

[Title of District Court and Cause.]

PETITION OF CHARLES E. SCHMDIT AND OTHER STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY TO INTERVENE ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER STOCKHOLDERS SIMILARLY SITUATED.

Now come Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal, and Walter L. Haehnlen, holders and owners of common and preferred stock of the said Northern Pacific Railroad Company, on behalf of themselves and all others similarly situated, of whom the holders of approximately 32,559 shares of said stock are cooperating with these, being practically all of the stock of said railroad company except that which is in possession of the Northern Pacific Railway Company, whether cancelled or owned by said railway company these petitioners do not have sufficient

knowledge to allege, and present this petition to intervene on behalf of themselves and all other preferred and common stockholders of the said railroad company similarly situated who may come in and share in this suit, and allege as set out below.

First. The petitioners filing this petition to intervene are enumerated below. All of the said individual minority stockholders are over the age of 21 years, are residents of the State of Pennsylvania and own and hold common and/or preferred stock of said Northern Pacific Railroad Company as follows: [844]

(a) George Landell is the duly appointed and qualified executor of the Estate of the late E. A. Landell, and said E. A. Landell owned at the time of his death and there has come into the hands of the executor, which he now owns and holds, 200 shares of said common stock of said railroad company, being certificate No. A 42067 and A 42068 for 100 shares each, dated June 13, 1890.

(b) Clarence Loebenthal is the duly appointed and qualified trustee for Bernard Loebenthal, and owns and holds 1500 shares of the common stock of said railroad company, being certificates No. A 56090 to A 56104 inclusive, for 100 shares each, dated December 30, 1901.

(c) Charles E. Schmidt is the owner and holder of 200 shares of the preferred stock of the said railroad company, being certificates No. 54792 and 54793 for 100 shares each, dated July 31, 1893, which were issued in the name of J. P. Paulding

and Co. and duly assigned to Charles E. Schmidt.

(d) Walter L. Haehnlen is the owner and holder of 121 shares of preferred and 240 shares of common stock of the said railroad company, of which 65 shares of the common were derived from certificates No. A 55983 for 100 shares dated February 7, 1898 in the name of Brice, Monges and Company and duly assigned to Walter L. Haehnlen and certificate No. B 8738 for 15 shares dated August 14, 1883 in the name of Samuel Forsyth; of which 100 shares of the common were derived from certificates No. B 21743 for 20 shares dated August 14, 1893 in the name of DeHaven & Townsend and duly assigned to Walter L. Haehnlen, certificate No. B 22104 for 15 shares dated September 2, 1893 in the name of DeHaven & Townsend and duly assigned to Walter L. Haehnlen, certificate No. B 21923 for 55 shares dated August 22, 1893 in the name of DeHaven & Townsend and duly assigned to Walter L. Haehnlen, certificate No. C 12011 for 10 shares dated August 30, 1893 in the name of DeHaven & Townsend and duly assigned to Walter L. Haehnlen and certificate No. A 56134 for 100 shares [845] dated September 22, 1902 in the name of Joseph I. Keefe and duly assigned to Walter L. Haehnlen; of which 50 shares of common were derived from certificate No. A 49237 for 100 shares dated November 4, 1892 in the name of Patrick Cunningham and duly assigned to Walter L. Haehnlen; of which 15 shares of the preferred is the

original certificate No. 051461 issued in the name of Jacob Witmer, dated June 2, 1891 and duly assigned to Walter L. Haehnlen; of which 50 shares of preferred were derived from certificates No. 56503 and 56504 for 100 shares each in the name of Katharine M. Lewis, dated June 14, 1906, and No. 039271 for 12 shares, dated June 14, 1906 in the name of Katharine M. Lewis and duly assigned to Walter L. Haehnlen.

Second. This petition is on behalf of the Northern Pacific Railroad Company and the minority stockholders of the said Northern Pacific Railroad Company above mentioned and hereinafter described and all other common and preferred stockholders of the said railroad company who may join herein and share the costs of the suit to redress, restrain or avoid the effect of certain unlawful and wrongful acts, had, done and threatened which have resulted in and will result in damage and injuries to the said railroad company and the petitioners and all other holders of the common and preferred stock of the said railroad company hereinafter more particularly and in detail averred and to that end to vacate and set aside all unlawful acts and actions had and done and to declare the rights of all parties and to redress all wrongs and to enjoin and restrain all further and proposed unlawful acts and deeds. One of the principal bases of this petition is to restore to the said railroad company all its rights, privileges, franchises, properties, money and assets, free and clear of all encumbrances, interference or

management of and by the said Northern Pacific Railway Company, hereinafter called the railway company, and to release the said railroad company from the captivities which it has been put into and held under by the wrongful and unlawful acts of [846] the said railway company and the officers and officials of the said railway company and the said railroad company as hereinafter set out and to declare, decree and enforce all the rights of the said railroad company and of these minority stockholders and all others in a similar position and of all of the said defendants and of all other persons interested as provided and mandatorily required in the Act of Congress approved June 25, 1929, sections 5 and 6, amending the act of July 2, 1864, and the Joint Resolution of May 31, 1870 (46 Stat. 355), all questions of laches being eliminated by the wording of the Act, which provided in part as follows:

> "Sec. 5 * * * In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine to what extent the terms, conditions, and covenants expressed or implied, in said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted

lands by virtue of authority conferred in said resolution of May 31, 1870 and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands, and relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law, or fact or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, and the United States and the Northern Pacific Railroad Company or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court all questions of law and fact, and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies, or their successors in interest under said Act of July 2, 1964, and said joint resolution of May 31, 1870, or in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the said joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment." * * *

"Sec. 6. * * * To carry out this enactment the court may render such judgments and decree as law and equity may require."

Third. These petitioners adopt and make part hereof the same as if reiterated and set out verbatim herein Paragraphs 43 to 67, both inclusive, being the cross bill portion, of the answer of the Northern Pacific Railroad Company filed by these petitioners in this cause on September 3, 1937 and the same is made a part hereof [847] by reference and is to be read and considered by the Court as a part hereof, with the correction, qualification or additional allegation that the deed in Paragraph 44 is copied from JCC, Part 5, page 3047, which gives the date of acknowledgment as May 3, 1895 and there is another similar deed in the Interior Department acknowledged May 3, 1875. These petitioners have not sufficient information at this time to determine whether or not there were two similar deeds in different years, one in 1895 and one in 1875.

Fourth. These petitioners and other stockholders opposed and protested the so-called foreclosure or reorganization of 1896 of the railroad company and they vainly endeavored to obtain all the facts, transactions and dealings connected with same but were constantly thwarted, rebuffed, circumvented and prevented by the officials of the railroad and railway companies and those associated with them. Thus not being able to obtain any proper and necessary information, data, facts and relief from the

officials of the company, these petitioners and others similarly situated began seeking a Governmental and a Congressional investigation to aid them in securing such information, data and facts. They continued in such efforts until they finally succeeded in obtaining the investigation by the Joint Congressional Committee, which resulted in the different reports and Act of June 25, 1929, under which this suit was filed. For further allegations see Paragraph 55 of the cross bill, which is made a part hereof.

Fifth. On November 20, 1900 Joseph Hoover, the owner of 250 shares of the common stock of the railroad company of the par value of $100, which he acquired in 1893, filed a suit in equity on behalf of himself and such other stockholders of the Northern Pacific Railroad Company as might intervene and become parties thereto in the Circuit Court of the United States (now the District Court) for the Southern District of New Yok (file No. P 7662) against the said railway company, railroad company, J. P. Morgan & Co. and the voting trustees [848] of the railway company and various parties interested in the so-called foreclosure and reorganization of 1896, attacking the said so-called reorganization of 1896, seeking discovery and seeking to have the railway company held to be a trustee holding all the properties and securities of the railroad company in trust for the plaintiff as such stockholder and all other stockholders similarly situated.

After the filing of the Hoover suit and the answers therein, efforts were renewed for a Congressional investigation and it was sought to have the stockholders of the railroad company assist in obtaining such investigation, but this was thwarted and prevented by the officials of the railway company and at the annual meeting of the stockholders on October 16, 1902 the following action is shown by the minutes:

"Mr. Geo. H. Earl offered the following preamble and resolution and moved their adoption. The motion was seconded by Mr. A. H. Gillard, to-wit:

"Whereas, the stockholders of the Northern Pacific Railroad Company in annual meeting assembled have full knowledge of all the proceedings and records upon the foreclosure of its mortgages and the purchase of its railroad land grant and property by the Northern Pacific Railway Company, therefore, be it

"Resolved: That the stockholders of the Northern Pacific Railroad Company expressly dissent from any action pretending to be taken in the name of or on behalf of the stockholders of this Company in anywise bringing in question in Congress or in any State of the United States the validity and completeness of such foreclosure proceedings or the title of the Northern Pacific Railway Company to its railroad land grant and property formerly of this

company, and declares any statements or action questioning the same as unwarranted and unfounded in law and in fact.

"Upon motion the meeting proceeded to vote upon the foregoing preamble and resolution by stock vote. The Secretary was directed to take and report the vote thereon. The Secretary duly performed his duty,—a vote was duly taken and the Secretary reported as follows:

"In favor of the said preamble and resolution 770,712 shares against the same 3,659 shares.

"Whereupon the Chairman declared that the motion made by Mr. Earl and the preamble and resolution referred to were duly adopted.

"While the voting was in progress, Mr. McCullen objected to any vote being cast upon said motion for or in behalf of the Northern Pacific Railway Company." [849]

That from October 16 1902 to the meeting of October 21, 1937, when the following resolution was rejected, the railway company and its officials at most, if not all, of the meetings of the railroad company thwarted and prevented any investigation of the affairs of the railroad company by Congress or otherwise and thwarted and prevented and refused to give relief to the non-assenting stockholders and to right the affairs of the railroad company.

"RESOLUTION

Whereas, at various meetings of stockholders of the Northern Pacific Railroad Company, a Federal Corporation, held in the City of New York since the year 1896, and down to and including the year 1934, resolutions have been offered on behalf of stockholders who had not assented to the so-called reorganization of said Company in the year 1896, whereby the property and assets of the Northern Pacific Railroad Company had been turned over to a corporation of the State of Wisconsin, formerly known as the Superior and St. Croix Railroad Company, and now known as the Northern Pacific Railway Company, and

Whereas, such resolutions so heretofore offered at said various meetings of the stockholders of the Northern Pacific Railroad Company were so presented in order to protect and preserve the rights of said Federal Corporation and all of the stockholders thereof, and looking toward a re-establishment and restoration of the interests of the Northern Pacific Railroad Company in the property and assets of said Company so turned over to said Wisconsin Corporation,

Whereas, at said various meetings of such stockholders, the Northern Pacific Railway Company, the Wisconsin Corporation above

referred to, purporting to act as the owner of more than seven hundred thousand (700,000) shares of the stock of the Northern Pacific Railroad Company, voted said stock by proxy against and defeated such resolutions looking to the relief of the said Federal Corporation and its stockholders, or voted to prevent adoption of the same, and

Whereas, the said Wisconsin corporation through its purported majority stock ownership as above mentioned, has since 1896 caused to be chosen its own nominees for directors and officers of said Federal Corporation and thus has dominated and controlled all the corporate activities of said Federal Corporation and has repeatedly thwarted the efforts of minority stockholders to obtain redress by action of the Federal Corporation, and

Whereas, in a certain proceeding in equity now pending in the District Court of the United States for the Eastern District of Washington, wherein the United States of America is plaintiff, and the Northern Pacific Railway Company and others, are defendants, steps have been taken by Walter L. Haehnlen, on behalf of himself and other minority stockholders of the Northern Pacific Railroad Company, for the protection of said Federal Corporation and its stockholders, whose annual meeting is being this day held in the City of New York, State of New York, [850]

Now, Therefore, Be It Resolved, by the stockholders of the Northern Pacific Railroad Company in annual meeting assembled in the City of New York, State of New York, that the incoming Board of Directors of the Northern Pacific Railroad Company be and they are hereby directed to lend all possible aid and assistance to the efforts so as above instituted by Walter L. Haehnlen in said above mentioned suit, to the end that the rights of the Northern Pacific Railroad Company and all its stockholders may be protected and preserved, and that an adjudication thereon be had in and by the Court having jurisdiction of the said cause."

The railway company voted its 770,673 shares of stock against the resolution and accordingly it was defeated, as only 1,573 other shares were present and voted for the resolution.

On October 15, 1903 at the annual meeting of the stockholders of the Railroad company Francis Lynde Stetson, a Director of the railroad company, and a director and general counsel of the railway company, offered a resolution, which was adopted as follows:

"Resolved that the stockholders of the Northern Pacific Railroad Company in annual meeting assembled hereby approve of all of the action of the stockholders of the Superior and St. Croix Railroad Company and of the North-

ern Pacific Railway Company in the years 1895 and 1896 to which reference is made in the third and final preamble to the Resolution this day offered by Joseph P. McCullen as proxy, and though disclaiming any interest in the stock of said Superior & St. Croix Railroad Company, request the Board of Directors of this Company to take any and all such action as it may deem proper or suitable to give full and final effect to such action and to this approval thereof and also to this disclaimer."

Referring to Paragraph 54 of the cross bill, petitioners further allege that the stock of the non-assenting stockholders of the railroad company was never forfeited or cancelled but was always recognized and notices given them and they attended and without objection took part in and voted at all the meetings of the stockholders of the railroad company, at which meetings practically all of the stock of the railroad company, except the non-assenting stockholders, was voted by the officials of the railway company.

The Mr. McCullen mentioned in the above proceedings was the same J. P. McCullen who represented these petitioners and whose briefs and statements are set out in the hearings of the JCC.

In the following year, 1903, depositions of various parties were taken on behalf of the plaintiff in the Hoover suit, both in the West [851] and in New York, and then there were negotiations between

counsel looking to settlements and discussion by correspondence between counsel and further taking of depositions and further efforts for a Congressional investigation, extending up to 1922 and later.

During this period Hoover, the plaintiff in that suit, these petitioners and others were still earnestly and continuously seeking a Congressional investigation, realizing that they could never uncover the true facts, data, information and the illegal and unlawful acts, deeds, transactions and doing of the officials of the railway company and the railroad company and the members of the stockholders protective committee, the bondholders committee, the members of the syndicate and the managers and others associated and allied with them in the so-called foreclosure or reorganization of 1896 by a suit in equity for discovery without the aid and assistance of a Congressional investigation.

The information that these petitioners have indicates that during this period and at all times after the taking of such depositions as the plaintiff took the railway company and railroad company did not desire to have the Hoover suit go to trial and they made no effort whatever to bring it on for trial but continued to prolong the matter by negotiations and discussions of settlement, Government investigation, or the taking of further testimony until the death of Francis Lynde Stetson, general counsel and attorney for all the defendants in the Hoover

case, about 1921, when the railway and railroad companies then tried to forget the case and ignore it, hoping that as John G. Johnson of Philadelphia, one of the attorneys for plaintiffs, was dead, it would not be further prosecuted. But these petitioners are informed that the suit has been kept alive, that Hoover's executor has been substituted as plaintiff, and is preparing to file further depositions.

The following are letters between counsel in the Hoover case: [852]

"6326 Drexel Road
Philadelphia, December 21st, 1921

In Re Northern Pacific R. R. Co.

Charles MacVeagh, Esq.
Mills Building, 15 Broad Street,
New York City, N. Y.

My dear Mr. MacVeagh:—

Shortly after the annual meeting of the stockholders of the Northern Pacific Railroad Company, last year, I called upon you to inquire as to what might be the likelihood of an amicable adjustment with the stockholders whom I had represented for some years, and who had not assented to the Morgan reorganization.

Though hoping for some favorable word from you I received no message of any kind.

Another annual meeting has taken place, and no settlement having been made or suggested, I am now asked to permit other counsel to suc-

ceed me since my present official position forbids my connection with the litigation, and I am requested to place with such succeeding counsel whatever data I may have at hand.

It has occurred to me that I should tell you why these stockholders continue so hopeful and so persistent in the assertion of their claims.

A gentleman, now deceased, whose name you would be familiar with if mentioned, whose standing as a lawyer was of the very highest, and who was familiar with the financial arrangements of both the Northern Pacific Railroad Company and the Northern Pacific Company made to me and to certain of my clients this statement:—

> 'There is, I am sure, a vital defect in the Northern Pacific reorganization. It involves a serious breach of trust and lapse of time will never cure it. This gives value to your stock. I cannot furnish you with the details, you must search them out, but I can say you are upon a danger line for the other side in making inquiries about the connections at Duluth and Superior and in Minnesota.'

This statement was accepted as a guarantee both of the merit and of the ultimate success of the claims represented. It led to investigation as to certain land grant lines east of the Missouri River which were combined with the land grant lines of the Northern Pacific.

It also led to inquiry as to the course pursued in the earlier readjustment or reorganization of 1875 upon foreclosure of the Jay Cooke mortgage.

Distinction was found to have been maintained between land grant 'lines' or railroad 'lines' and lines of railroad construction, a single construction representing more than one 'line' of railroad and a 'lease' of unbuilt railroad of the Northern Pacific was entered upon under a 'construction contract.'

In 1875 the unbuilt road was estimated at 1483.36 miles, which taken with other lines of 370.84 miles, made 1854.20 miles, for which were issued Bonds at $20,000

per mile, or	$37,084,000
and Preferred Stock at $30,000	
per mile, or	55,626,000
Making together,	$92,710,000

[853]

These basic securities were allotted as follows:

20% thereof to the company			
Viz. Bonds	$ 7,416,800		
Preferred Stock	11,125,200	$18,542,000	
30% thereof to the old Common stock and 'Original Proprietary agreement' interests			
Viz: Bonds	$11,125,200		
Preferred Stock	16,687,800	27,813,000	
50% thereof to the Bondholders and others who became 'Preferred Stockholders' under the Plan of 1875			
Viz: Bonds	$18,542,000		
Preferred Stock	27,813,000	46,355,000	$92,710,000

Later these securities (allotted in similar proportions) were increased so as to be:—

Bonds	$37,500,000
And Preferred Stock	56,250,000
Making together,	$93,750,000

These basic securities did not go out to the public to be dealt in, but were deposited and held in trust, and were the muniments of title to the Northern Pacific Railroad and Land Grant. These securities did not pass by means of the foreclosure sales of 1896 but were acquired by means of the arrangement and agreement entered into by the Reorganization Managers with the Directors of the Northern Pacific Railroad Company and with certain fiduciaries in violation of the trust under which the earlier reorganization of 1875 was effected.

This is the situation presented through the information given us and it would seem that the non-assenting stock-holders are entitled to an accounting.

Very truly yours,
(s) JOSEPH P. McCULLEN"

"Stetson Jennings & Russell
Attorneys and Counsellors At Law
Mills Building, 15 Broad Street
New York

February 21, 1922

My dear Judge:

I owe you an apology for the delay in further answering your letter of December 21, 1921, which was received just prior to the Christmas holidays and about which I wrote you.

I have conferred on the subject with Mr. Gardiner, who has knowledge of the 1896 reorganization of the Northern Pacific Railroad [854] Company and has been familiar with the proceedings of the Northern Pacific Railway Company, including the suit brought by you many years ago, and with your subsequent correspondence from time to time with our late partner, Francis Lynde Stetson, in respect to the claims of Northern Pacific Railroad stockholders who failed to participate in the reorganization. If we understand your letter correctly, the point which you now present was set out in your letter of November 3, 1914, to

Mr. Stetson, and to this letter he replied under date of November 13, 1914. Subsequently, in a letter to Mr. Stetson dated March 27, 1916, you presented the same point with some variations; and to this he replied under date of March 28, 1916. In this last mentioned letter Mr. Stetson advised you of the position of the Company at that time and, so far as I am advised, this has not changed.

I am, my dear Mr. McCullen,

Very truly yours,

(s) CHARLES MacVEAGH

Honorable Joseph P. McCullen,
6326 Drexel Road,
Philadelphia,
Pennsylvania."

During the winter of 1917 and 1918 the railroad were taken over, operated and held by the United States until March, 1920.

These petitioners are informed, believe and charge that there was other correspondence and other negotiations between counsel in the Hoover case between 1916 and 1922 and later.

Sixth. The land grant was conferred by Congress with the thought that it would fully pay for the construction of the railroad and Josiah Perham, at the first meeting of the Board of Commissioners, averred that he deemed the lands sufficiently valuable to not only pay for the construction of the railroad but to leave for the stockholders more than

three hundred and fifty millions of dollars besides. The great value of the land grant has always been recognized, and as late as in the proceedings for the receivership of 1893 (preliminary to the reorganization of 1896) in the creditors' bill filed in August, 1893 by P. B. Winston and others against the Northern Pacific Railroad Company, in the United States Circuit Court for the District of Minnesota, Third Division, (No. 638, Equity "C"), it was averred in connection with the land grant that if the lands could be taken into judicial custody "the proceeds that will be received from such sales, [855] together with the earnings of the defendant's railway system will be more than sufficient to pay and discharge all of the defendant's obligations to its creditors, and preserve for its stockholders said railway system freed from debt."

The valuation of three hundred and forty-five millions of dollars ($345,000,000) placed upon the Northern Pacific Estate in and by the plan of March 6, 1896 and the agreement of July 13, 1896, and later admitted by the railway company's officials to be the actual value, is more than one hundred and three millions of dollars in excess of all liabilities of the railroad company, including its capital stock, as appears by its last report to August 31, 1896, filed with the Railroad and Warehouse Commission of Minnesota and with the Interstate Commerce Commission at Washington, and it is more than one hundred and eighty-seven millions of dollars ($187,000,000) in excess of all the liabil-

ities of the railroad company to said date exclusive of its capital stock of $84,205,446, as per said reports:

The total liabilities of the railroad company on August 31, 1896, including all its outstanding capital stock amounted to $241,975,270.96, whilst the cost of construction and equipment of the railway company on the following day, September 1, 1896, is reported at $306,639,886.35, an increase of more than $64,000,000, and it had never constructed or bought a foot of trackage except what was built for it by the railroad company and included in the railroad company's property, as elsewhere herein alleged, except possibly four miles built in July, 1896.

The total liabilities of the railroad company on August 31, 1896, excluding capital stock, amounted to $157,769,824.10, whilst on the following day September 1, 1896, the cost of construction and equipment was placed at $148,870,062.25 in excess of this, to-wit, at $306,639,886.35 as above stated.

The total assets of the railroad company on August 31, 1896, exclusive of equipment are stated in the report to be $216,157,165.40. [856]

The item of cost of property exclusive of equipment as of September 1, 1896, with the railway company is $293,947,706.35, an increase of $77,790,540.95.

In the assets of the railroad company appears an item in this report of August 31, 1896—"Assets

transferred to Northern Pacific Railway Co.—$2,769,441.91", without any explanation.

The Railway company filed a statement in Montana dated July 13, 1896 and sworn to by President Adams and Secretary Gardiner, in part as follows:

"2. The amount of its capital stock is one hundred fifty-five millions of dollars, divided into shares of 100 each the aggregate of which $75,000,000 are preferred stock and $80,000,000 are common stock.

3. The amount of its capital stock actually paid in in money is $4,300.

4. The amount of its capital stock paid in otherwise than in cash is $154,995,700, and the same was paid in by the sale and transfer to the company of stocks, bonds, and securities formerly of or belonging to the Northern Pacific Railroad Co. or of interests therein.

5. The amount of assets of the corporation is $4,100 in cash and the stocks, bonds and securities before mentioned, or interests in the stocks, bonds and securities before mentioned, of or formerly belonging to the Northern Pacific Railroad Co., to an aggregate amount of which the actual cash value exceeds $40,000,000.

6. The liabilities of such corporation are such as have been incurred for and in connection with the purchase of the property of the said Northern Pacific Railroad Co.; and while not yet specifically formulated, an indebtedness equal to or not exceeding the sum of $190,000,-

000 has been or will be created by the said corporation, all of which will be secured by mortgages upon the property, franchises and railroads now or formerly of the Northern Pacific Railroad Co.

City of New York,
County of New York, State of New York, ss:

In attestation of the truth of the foregoing statement, we, the undersigned, constituting a majority of the board of directors of the Northern Pacific Railway Co., have hereunto set our hands this 13th day of July, A. D. 1896.

EDWARD D. ADAMS
A. H. GILLARD
MORTIMER F. SMITH
VICTOR MORAWETZ
GEORGE H. GARDINER
W. PAXTON LITTLE
J. W. ALMY, JR.
FRANCIS LYNDE STETSON

[857]

City of New York
County New York, State New York, ss:

Edward D. Adams, president, and George H. Gardiner, secretary, of the Northern Pacific Railway Co., a corporation, which makes the foregoing statement, each being first duly sworn upon his oath, says that he has read the foregoing statement, and that the same is true, and said affiants further say that the above signa-

tures of directors are genuine and that the signers constitute a majority of the board of directors of the corporation.

Subscribed and sworn to before me this 13th day of July, A. D. 1896.

EDWARD D. ADAMS
GEORGE H. GARDINER

In witness whereof I have hereunto set my hand and affixed my official seal the day and year last above written.

[Seal] JOSEPH B. BRAMAN
Commissioner of Deeds for the State of Montana.
In and for the State of New York, Resident in said city of New York."

The statement that only $4,300 was "actually" paid in in cash on railway company stock contradicts and overcomes any claim that the so-called deposits of $10.00 and $15.00 on railroad stock was in payment for railway company stock.

Any contention that the deposits were on the railway company stock is contrary to the Wisconsin statute in force in 1896 which provided as follows:

"No corporation shall issue any stock or certificate of stock except in consideration of money or labor or property estimated at its true money value, actually received by it equal to the par value thereof," etc.

On April 18, 1899, on appeal of those interested in sustaining the reorganization for the Northern Pacific Railway Company the statute was amended by adding thereto this proviso, which is null and void as attempting indirectly to amend the railway company charter to give powers which could not under the constitution be done directly:

> "Provided that nothing in this section contained shall apply to any issues of stock or of bonds heretofore or hereafter made by any railroad corporation in accordance with any plan of reorganization adopted by the holders of the greater amount of the bonds, or of the stock of any insolvent railroad corporation whose railroad wholly or partly within this state, has been sold or hereafter shall be sold at mortgage sale, or in bankruptcy or at other judicial sale and acquired by the railroad corporation making such new issue of stock or of bonds or of both; and any and all such issues heretofore made in conformity with any such plan of reorganization are hereby legalized, ratified and confirmed." [858]

A void amendment of Section 1788 of the revised statutes of Wisconsin relative to reorganization was likewise obtained by the same parties on April 18, 1899, by adding thereto the following:

> "Any railroad corporation existing under the laws of this state, with the authority or the approval of the holders of a majority of the

shares of its capital stock given either in writing or at a meeting called for that purpose, may purchase any railroad and other property, franchises, rights and immunities, in this or any other state or states, of any insolvent railroad corporation whose railroad shall be sold at mortgage sale, or in bankruptcy or upon any other judicial sale, provided that the railroad so purchased shall not be parallel or competing with any constructed railroad owned or controlled and operated by the purchasing corporation, and shall be a continuation of, or be connected with, or intersected by, a line of railroad owned, leased or operated by such purchasing corporation, or which it shall be authorized to build; and in consideration of such railroad and other property, franchises, rights and immunities, so purchased, any such purchasing railroad corporation may issue and deliver its own bonds and shares of its capital stock, in such amounts and at such prices, and on such terms and conditions, including any terms and conditions as to voting power and dividends in respect of any such stock as shall be so approved by the holders of a majority of the stock of such purchasing railroad corporation; and any and all purchases, and issues of stocks and of bonds such as are authorized by this act, heretofore made by any railroad corporation existing under the laws of this state are hereby legalized and confirmed."

This void amendment seemingly fails to authorize the purchase of property or stock of a foreign or Federal Corporation, and the amendment is prohibited from applying to or affecting the railroad company by Roberts vs. Northern Pacific Railroad Company, 158 U. S. 1; 39 L. ed. 873 hereinafter quoted in Paragraph 15.

Seventh. The invalid so-called reorganization of 1896 was not, as customarily is done, left to a committee by J. P. Morgan & Company were made Reorganization Managers and all of the assenting stock of the railroad company was sold to them so they could and did exercise the right of ownership and voting and they also voted during the same period the stock of the railway company. For further allegations see Paragraph 57 et seq. of the cross bill, made a part hereof.

The Reorganization Managers pursuant to an arrangement with the officials of the railroad corporation undertook to deal with the property itself of the railroad corporation by treating the share certificates as equivalent to the property itself. In the Reorganization Agreement (Paragraph 5) it was thus stipulated as to this [859] "in every case all the provisions in the plan and this agreement shall equally apply to and in respect of any physical properties embraced under the re-organization, and to and in respect of any securities representing any such property, it being intended that for all purposes thereunder, any such property and any security representing such property may be treated

or accepted by the Managers as substantially identical."

Pursuant to this the Reorganization Managers on July 13, 1896 entered into an agreement with the railway company under which they expressly agreed to place in the name of the railway company the "property and franchises" of the railroad corporation and under this agreement there was issued by the railway corporation to the Reorganization Managers in payment of the purchase price,

New Common Stock	$ 80,000,000
New Preferred Stock	75,000,000
New Prior Lien Bonds	73,816,500
New General Lien Bonds	56,000,000
Total stock and bonds issued to the Reorganization Managers in payment of the property	$284,816,500

This agreement was made July 13, 1896, which was prior to the foreclosure sale, and the $155,000,000 of stock was issued to the Reorganization Managers as part of the payment on July 13, 1896, prior to the foreclosure sale.

In speaking, in 1903, of the agreement of July 13, 1896, Francis Lynde Stetson, general counsel and director of, and speaking for, the railway company, said that the railway company by amendment to its charter was authorized to purchase a railroad from Lake Superior to the Pacific Coast, that the only railroad answering that description was the

Northern Pacific Railroad Company and that "the only way of acquiring that railroad was by the acquisition of the securities then in the possession of the Re-organization Committee." [860]

Relative to the distinction between the securities and the property itself covered by securities he testified: "Now I cannot see that there is any distinction between those. There is an inconsistency in your mind but there is none in mine, for I think the substance and the shadow are the same."

He further said, "If I hadn't supposed that that Wisconsin corporation would thereby acquire the property of the Northern Pacific Railroad, I never would have approved of that contract; but I supposed that that would be the effect of the contract as it was."

The Re-organization Managers undertook as stockholders and as proprietors of the company to deal with the property itself and under the agreement of July 13, 1896, agreed to get in all the old stock of the Federal Corporation.

On September 1st, 1896, however, when the railway company entered into possession of the property there was outstandng of the old stock of the Federal Corporation which the Reorganization Managers had not acquired shares amounting to the par value of something over $9,100,000.

In April of 1897 the Reorganization Managers filed their report and account with the railway company and they turned back and delivered to the railway company about $9,246,000 of the new securities which had been created and issued to

them (the Reorganization Managers) in payment for the railroad company property. This turning back or re-delivery was made, however, by Morgan & Co. under the express condition that the railway company "now and at all times will indemnify and will hold us harmless against every claim, liability and obligation of every name and nature which may have been incurred by us or which may be asserted against us in respect of any of our acts, proceedings, omissions or defaults as Reorganization Managers."

Pursuant to this the railway company passed a resolution setting forth in brief: [861]

> "Resolved that this Company hereby accepts and receives from the said J. P. Morgan & Co. the said assets this day delivered, upon the condition of its assumption, and it hereby assumes all and every, of the outstanding liabilities of the said J. P. Morgan & Co. in respect of any property purchased, or undertakings given, or of any and all assumptions of any kind by them made in respect of any of their transactions or of any of the property connected with their transactions as such Managers" . . . Then follows an agreement to indemnify Morgan & Co., "against any and all persons whomsoever and from any and all claims and liabilities of every name and nature whatsoever arising or resulting from or connected with any act, omission or default of them or of any member of them from, in the execution or performance, or in the attempted execution or performance of the

said plan and agreement of March 16th, 1896, or of the agreement between the said J. P. Morgan & Co. and this company dated July 13, 1896."

The plan provided "the managers as they may deem necessary may defer the performance of any provision of the plan of this agreement or may commit such performance to the new company," being the railway company.

Having thus assumed the liabilities of J. P. Morgan & Co., Reorganization Managers, one of which liabilities was to acquire and turn over all the outstanding stock of the railroad corporation, the railway company in its first report filed with the Railroad Commissioner of Wisconsin subsequent to the reorganization, has added to the "cost" of the property acquired as of September 1st, 1896 the $9,100,000 and odd, the par value of the old stock of the railroad corporation which had not then been gotten in.

Said report shows "Total cost as of September 1st, 1896, of property purchased at foreclosure $293,947,706.35

Whilst it is admitted and it is shown by the printed annual report that all the stocks and bonds issued in payment as of September 1st, 1896, amounted to 284,816,500.00

Making the difference in "cost" charged up but not paid $ 9,131,206.35

This is about the par value of the old railroad company stock that was not gotten in, which included the stock owned by these petitioners and those cooperating with them, amounting to approximately 32,559 shares of the par value of $3,255,900 as alleged hereinbefore. [862]

That between September 1st, 1896 and June 30th, 1897 about 9,000 shares additional of the old railroad company stock were gotten in by the railway company, the same being of the par value of $900,000 and during that period about $996,000 additional Prior Lien Bonds were issued "in exchange for the property."

These petitioners are informed, believe and so charge that the Reorganization Managers were required to account for all of the securities, all of the stocks and all of the bonds of the railroad company, "in the hands of the Public," (See also page 6 of their report and accounts) and that the railway company assumed liability for all of the old outstanding stock of the railroad corporation which Morgan & Co. were to have acquired for the railway company, as also evidenced by its charging up the value of such stock as an item of cost and by its agreement to assume the liabilities of Morgan & Co., all of which is in accord with the true purpose and intent of the agreement of July 13, 1896.

Eighth. The agreement between Morgan & Company as the Reorganization Managers and the railway company, Exhibit N to the bill (Printed Exhibits Volume 1, page 189) was dated July 13, 1896,

twelve days before the date of the fake and so-called foreclosure whereby the Reorganization Managers agreed to vest in the railway company "the ownership of all of the stocks, bonds or other property representing the system formerly of the Northern Pacific Railroad Company. The use of the word "formerly" was to emphasize the fact that the title was out of the Northern Pacific Railroad Company prior to the fake and so-called foreclosure sale and such was the intent and purpose of the Plan and Acts and they were so construed by the parties thereto at the time.

The stocks and bonds of the railway company were issued and delivered July 13, 1896 to pay for all the property, franchises, securities and assets of the railroad company as an outright sale and which were delivered to the railway company. The sale as made is set out in the following documents:

[863]

"New York, July 13, 1896

To the Northern Pacific Railway Company.

Dear Sirs:—

"In performance of the agreement this day made between your corporation and ourselves, as Reorganization Managers of the Northern Pacific Railroad Company, we hereby transfer and deliver to you, as in said agreement proposed, all the right, title and interest held by us as Reorganization Managers, in and to the stocks, bonds and securities mentioned in the

schedule hereunto annexed, and as therein specified.

"And we further agree, from time to time hereafter as the same shall come into our possession and under our control as such Reorganization Managers, to transfer and deliver to you all of the property, franchises, stocks and bonds of the Northern Pacific Railroad System, as acquired and received by us as such Reorganization Managers.

"In consideration thereof we hereby request you to deliver to us, in pursuance of said agreement, certificates of the fully paid, non-assessable Preferred Stock of the Northern Pacific Railway Company for $75,000,000 and certificates of the fully paid, non-assessable Common Stock of the Northern Pacific Railway Company for the aggregate amount of $80,000,000.

"And we further request you from time to time, when the same shall have been executed, to deliver to us Prior Lien Bonds of the Northern Pacific Railway Company for the aggregate principal sum of $130,000,000, and General Lien Bonds of the Northern Pacific Railway Company for the aggregate principal sum of $60,000,000 as in said agreement provided.

"Requesting your acknowledgment of this delivery, were are,

Yours very truly,

J. P. MORGAN & CO.

Reorganization Managers of the Northern Pacific Railroad Company."

"SCHEDULE.

Annexed to the Reorganization Manager's Letter, July 13, 1896, to the Northern Pacific Railway Company $24,493,000.00 Northern Pacific Railroad Co. General First Mortgage Bonds, $19,078,000.00 Northern Pacific Railroad Co. General Second Mortgage Bonds, $11,267,-000.00 Northern Pacific Railroad Co. General Third Mortgage Bonds, $490,217.00 Northern Pacific Railroad Co. Dividend Scrip, $44,923,-000.00 Northern Pacific Railroad Co. Consolidated Mortgage Bonds, $9,493,000.00 Northern Pacific Railroad Co. Collateral Trust Notes, $33,148,506.82 Northern Pacific Railroad Co. Preferred Stock, $41,902,400.00 Northern Pacific Railroad Co. Common Stock, $3,000,000.00 Northwest Equipment Co. Stock, [864] $349,-000.00 Coeur d'Alene Railway Co. First Mortgage Bonds, $650,000.00 Northern Pacific & Manitoba Terminal Bonds, $306,000.00 Helena & Red Mountain Railroad Co. Bonds, $962,-000.00 James River Valley Railroad Co. Bonds, $5,157,000.00 Northern Pacific & Montana Railroad Co. Bonds, $1,569,000.00 Spokane & Palouse Railroad Co. Bonds.

(signed) J. P. MORGAN & CO.
Reorganization Managers."

"New York, July 13, 1896.

Messrs. J. P. Morgan & Co.,
Reorganization Managers of the
Northern Pacific Railroad Company.

Dear Sirs:—

Referring to your letter of this date, the Northern Pacific Railway Company hereby acknowledges that it has received from you the stocks, bonds, and securities therein mentioned, and also accepts your promise and agreement from time to time hereafter to deliver the property, franchises, stocks and bonds of the Northern Pacific Railroad System as stated by you.

In consideration of such delivery, this Company hereby issues and delivers to you its certificates for its fully paid, non-assessable stock, as follows:

(a) Preferred stock to the aggregate amount of $75,000,000

(b) Common stock to the aggregate amount of $79,995,700 the remaining $4,300 of common stock having heretofore been issued and being held by the Directors of this Company as qualifying shares.

At the same time, this Company hereby notifies you that your firm has been appointed to be and to act as the Fiscal Agents of this Company until further notice, and it hereby requests that as such Fiscal Agents, you will, in behalf and for the account of this Company,

and subject to its direction, hold in your possession, or subject to your control, the several stocks, bonds and other securities by you this day delivered to this company in pursuance of the agreement aforesaid.

You are hereby requested to acknowledge the receipt of this communication, and your acceptance of this appointment and trust.

NORTHERN PACIFIC RAILWAY COMPANY

By EDWARD D. ADAMS,

[Seal] President.

George H. Gardiner,

Secretary." [865]

"New York, July 13, 1896

To the Northern Pacific Railway Company,

Dear Sirs:—

Referring to your communication of this date, we herewith advise you that we have received the same, and that we accept appointment, as therein stated, of the position of Fiscal Agents of the Northern Pacific Railway Company, and as such Fiscal Agents will hold the stocks, bonds and other securities mentioned in your communication, subject to the terms therein stated.

We are,

Yours very truly,

J. P. MORGAN & CO."

"Extract From Minutes of Meeting of Board of Directors of
Northern Pacific Railway Company
Held April 29th, 1897

The following letter was read:

New York
New York, April 29, 1897.

To the Northern Pacific Railway Company:

Gentlemen—We beg leave to refer you to the account of our proceedings filed with your Board, contained in the pamphlet entitled 'Report and Accounts of J. P. Morgan & Co., as Reorganization Managers of the Northern Pacific Railroad Company (under Plan and Agreement of Reorganization, dated March 16, 1896),' together with the certificate of the Comptroller of your Company, verifying and attesting to the accuracy thereof.

From these accounts, it will appear that, as Reorganization Managers, we have accounted fully for all the property and assets by us received, excepting the following securities:

$ 10,500	Northern Pacific Railway Co. Prior Lien Bonds.
3,380,000	Northern Pacific Railway Co. General Lien Bonds.
4,086,300	Northern Pacific Railway Co. Preferred Stock, Trust Certificates.
2,500,000	Northern Pacific Railway Co. Common Stock, Trust Certificates.

Herewith we hand you all of said securities, except $10,500 Prior Lien bonds and $880,000 of the General Lien Bonds, which we reserve to indemnify us against any unsettled claims or liabilities growing out of the reorganization.

All the foregoing securities are now transferred to, and are to be accepted by, your Company upon the express condition that your Company now and at all times will indemnify, and will hold us harmless against [866] every claim, liability and obligation of every name and nature which may have been incurred by us, or which may be asserted against us, in respect of any of our acts, proceedings, omissions or defaults as Reorganization Managers.

Yours very respectfully,
J. P. MORGAN & CO.

The letter of J. P. Morgan & Co., the certificate of the Comptroller, and the pamphlet enclosed in said letter, having been carefully considered and generally examined, the following preambles and resolutions were adopted by the affirmative vote of every Director present excepting Messrs Coster, Bacon and Stetson, who retired from the room and refrained from voting:

Whereas, The Accounts of Messrs. J. P. Morgan & Co., the Reorganization Managers of the Reorganization of the Northern Pacific Railroad Company, under the Plan and Agree-

ment dated March 16, 1896, have been duly filed with the Board of Directors of the Northern Pacific Railway Company, this being the new company organized under such Plan and Agreement, within one year after the completion of its organization, all as provided in Article Ninth of said Agreement; and

Whereas, All of such accounts have been duly examined by or in behalf of this Board and in all particulars have been found to be correct; and

Whereas, It has appeared, to the satisfaction of this Board, that all the purposes of the plan of reorganization have been accomplished, that all the expenditures of the said Managers have been properly made, and that all moneys and securities and other assets at any time by it received have been properly accounted for and have been turned over to this Company, except $10,500—Prior Lien Bonds and $880,000 General Lien Bonds of the Northern Pacific Railway Company, which, with the assent of this Company, have been reserved by J. P. Morgan & Co. for the purposes set forth in their letter of April 29, 1897; and

Whereas, The Managers have made their final report, and have transferred the various securities to this Company upon the express condition that the Managers shall be fully

indemnified against any and all claims of every name and nature;

Now, Therefore, It is Hereby

Resolved, That the said accounts of the J. P. Morgan & Co., the Reorganization Managers, be, and they are hereby, audited and approved by the Board of Directors of the Northern Pacific Railway Company, and the same are hereby, declared to be in all respects final, binding and conclusive upon this Company and upon all the parties having any interest therein, and said J. P. Morgan & Co. and each member thereof respectively are hereby released from all liability of every name and nature in respect of each and every of their transactions as Reorganization Managers except that J. P. Morgan & Co. shall duly account for the $10,500 Prior Lien Bonds and $880,000 General Lien Bonds by them reserved as aforesaid.

Resolved, Further, That this Company hereby accepts and receives from the said J. P. Morgan & Co. the said assets this day delivered, upon the condition of its assumption, and it hereby assumes all and every, of the outstanding liabilities of the said J. P. Morgan & Co. in respect of any property purchased, or undertaking given, or of any and all assumptions of any kind by them made in respect of any of their transactions or [867] of any of the property connected with their transactions as such Managers; including especially all liabilities

and undertakings growing out of the correspondence set forth in said report under the headings 'Chicago and Northern Pacific' settlement and 'Wisconsin Central' settlement; this Company hereby agreeing to carry out all such undertakings; and the Northern Pacific Railway Company hereby expressly agrees to protect and to hold harmless the said J. P. Morgan & Co., and each and every member thereof, against any and all persons whomsoever, and from any and all claims and liabilities of every name and nature whatsoever, arising or resulting from or connected with any act, omission or default of them or of any member of them, from, in the execution or performance, or in the attempted execution or performance, of the said Plan and Agreement of March 16, 1896, or of the Agreement between the said J. P. Morgan & Co. and this Company, dated July 13, 1896. And it declares that in all and every particular the said J. P. Morgan & Co. and the members thereof have fully complied with and have performed all of the provisions of the said Plan and Agreement of March 16, 1896, and also the said Agreement of July 13, 1896, between the said J. P. Morgan & Co. and this Company.

Resolved, that the Secretary of this Company be, and he is hereby, authorized and directed to cause to be transmitted to the said J. P. Morgan & Co. a

copy of these resolutions, duly authenticated and attested under the corporate seal by the Secretary of this Company.

I, Charles F. Coaney, Secretary of the Northern Pacific Railway Company, do hereby certify that the foregoing is a true extract from the record of proceedings of the Board of Directors of said Company at a meeting duly held pursuant to notice at 35 Wall Street, New York, April 29th, 1897.

Given under the seal of the Company this 30th April, 1897.

(signed) CHARLES F. COANEY
Secretary"

[Seal of Northern
Pacific Railway
Company]

The agreement of July 13, 1896 (Exhibit "N" to the Bill) in section 8 provided: "that the Reorganization Managers may construe said plan and its construction thereof shall be conclusive and it may supply any defect or omission"; the Reorganization Managers—Morgan & Co. construed the plan to require the purchase of all the stock of the railroad company and they charge themselves with this liability, put aside and retain securities to cover such liability, and delivered to the railway company other securities sufficient to cover same, which the railway company put aside to cover such liability and gave bond to protect the Reorganization Managers.

Ninth. The president of the railroad company,

Brayton Ives, on [868] the word of Silas W. Pettit, a director of and attorney for the railroad and attorney for the Stockholders' Protective Committee, as part of the collusive and fraudulent agreement between the Stockholders' Protective Committee and the Reorganization Managers, undertook to waive jurisdiction of the United States District Court for the District of Michigan of the subject matter of the suit and to confess judgment of foreclosure.

The Stockholders' Protective Committee could have, as was admitted later by its chairman, Brayton Ives, prevented the foreclosure and ultimately the reorganization of the railroad company on the plan followed.

The expenses of the Stockholders' Protective Committee were paid by J. P. Morgan & Co., representing the Syndicate and the Reorganization Managers.

William Nelson Cromwell was attorney for the Stockholders' Protective Committee, was attorney for Receivers Oakes, Payne and Rouse, attorney for Winston, who filed a stockholders suit against the railroad company, attorney for Adams' Reorganization or Bondholders' Committee, and attorney for George R. Sheldon, who was a director of the railroad company, member of the Stockholders' Protective Committee and member of the firm of Shelden & Co., for whom Cromwell filed the creditors suit against the railroad company.

The Stockholders' Protective Committee was a self constituted committee of Directors of the railroad company consisting of Ives, Belmont, Sheldon and Tower, who became members of the syndicate and their acts were never authorized or approved by or with consent of the stockholders nor were any of the reorganization plans or agreements authorized or approved by the stockholders of the railroad company.

The reorganization plans provided for property agreed and known to be worth $345,000,000 to be transferred for the stock and bonds of some company, later decided to be the railway company. [869]

The so-called fake foreclosure sale was at the price of $12,500,000, but all of the securities were transferred and delivered and not just $12,500,000 and then $18,000,000 of its stock was returned to the railway company in addition to securities returned in Morgan's letter of April 29, 1897, and nothing was given to the non-assenting minority stockholders. This was all just part of the scheme and plan to hold all the property and securities of the railroad company intact in the physical possession of one corporation regardless of whether any or all title or right was left in the railroad or passed from the railroad to the railway, so long as the public, knowing the facts as it did, would accept the bonds and stock of the railway company, believing that in some way the property and securities of the railroad company, worth $345,000,000, were

in some unexplained manner behind said bonds and stocks, whether by title in the railroad company reached through the railway's physical holding and possession of same or its ownership of most of the preferred and common stock of the railroad company, and thus holding the said stock of the railroad company as a trustee for the holders of the railway company's stocks and bonds.

As a further part of such scheme and plan the railway company put a clause in the mortgage or deeds of trust it executed providing for a merger or consolidation with or a conveyance to a Federal corporation of the property and securities described in such mortgages or deeds of trust, which are in truth and in fact the property and securities of the railroad company, knowing that the railroad company was the only Federal corporation such a merger or consolidation could be had with or such conveyance could be made to as Congress refused to grant in 1896 another Federal charter as urged and sought by the Reorganization Managers, Syndicate Members, Stockholders' Protective Committee, Bondholders' Committee and officers of the railroad company; Senate Resolution 124, 54th Congress, 1st Session, was introduced April 8, [870] 1896, reported favorably April 21, 1896, amended June 6-11, 1896, went over January 21-February 19, 1897 and never voted on. (See JCC, Part 4, page 2065, et seq.) The resolution is as follows:

"Mr. Mitchell, of Oregon, introduced the following joint resolution, which was read twice

and referred to the Committee on the Judiciary:

"Joint Resolution to facilitate the reorganization of the Northern Pacific Railroad Company; to secure the actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action, control of its railroad to any corporation, company, person or association of persons owning, operating, or controlling a parallel or competing railroad.

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, that the purchasers of the railroad property of the Northern Pacific Railroad Company, which may at any time hereafter be sold at judicial sale in any suit or suits for the foreclosure of any of the mortgages heretofore executed by said company thereon, may organize anew by filing in the office of the Secretary of the Interior a copy of the deed or deeds conveying said railroad and property with a certificate signed by a majority of them, setting forth the name adopted by them, the names, number and residences, respectively, of

its directors, and a copy of any plan of reorganization adopted by said purchasers or pursuant to which such purchase shall have been made. Upon filing such certificate such purchasers, their associates, successors, and assigns shall, by the name specified in said certificate, have and be invested with all the estate, right, title, and interest of said purchasers in and to such railroad and property, and shall possess franchises, rights and powers the same as the Northern Pacific Railroad Company and shall be subject to all the obligations and duties imposed by Congress upon said company, and may acquire and hold any property and branches of the Northern Pacific Railroad Company; and it may acquire and construct additional branches or feeders in any state as authorized by the laws thereof; and upon such terms and conditions as may be provided in the plan of reorganization filed aforesaid it may from time to time issue such bonds, secured by mortgage upon its property and franchises or otherwise, not exceeding in the aggregate the sum of one hundred and ninety million dollars, and twenty-five thousand dollars additional per mile for railroad hereafter constructed, and such stocks, preferred or common, as shall have been authorized by such plan: Provided, that except as such stock shall have been issued for property acquired under such plan, no additional stock

shall be issued, except for money, labor, or property estimated at its actual cash value, to the par or face value of the stock, and that any such mortgage shall be filed and recorded in the office of the Secretary of the Interior as sufficient proof and notice of its legal execution and effectual delivery and of the lien thereby created: Provided, that such successor company, its successors and assigns, shall sell to any applicant therefor for purposes of actual settlement and cultivation in tracts of not less than forty nor more than one hundred and sixty acres each at a price not exceeding two dollars and fifty cents per acre any agricultural land lying more than one mile from said railroad and then unsold heretofore granted by Congress to the Northern Pacific Railroad Company and acquired by purchasers as aforesaid, but this proviso shall not apply to lands chiefly valuable for timber, coal, iron or stone; and said company may reserve to itself, its successors and assigns, in the sale of any lands applied for hereunder [871] merchantable timber and stone not needed for building and fencing thereon, and all coal and iron which may be found thereon, and the right to take therefrom gravel for its own uses: Provided, however, that said company shall have the right to reserve from sale hereunder and to otherwise dispose of such tracts or bodies of arid lands

as it shall deem necessary or advisable for use in any way in promoting and developing irrigation through companies or associations organized under and subject to the laws of the States in which such lands are situated: And provided further, that neither the Northern Pacific Railroad Company nor such successor corporation, its successors or assigns, shall consolidate its stock with or sell, convey or lease said railway, or by other corporate action give control or management over and of the same to any corporation, company, person, or associations of persons owning, operating, or controlling a parallel and competing line of railway; and any contract entered into by said successor company in violation of the provisions hereof shall be null and void, and may be enjoined at the suit of the United States or any state in which said road or any part thereof is situate in any court of competent jurisdiction: And provided also, that nothing herein contained shall be construed as making any additional grant of lands to such successor corporation or as a waiver of any right of the United States now existing to enforce any forfeiture of lands heretofore granted to the said Northern Pacific Railroad Company, or as in any manner affecting the vested rights of any settler or settlers on any of the lands heretofore granted to the Northern Pacific Railroad Company or of any purchaser or

purchasers of any such lands from said company."

The directors and officials of the railway company have been careful to keep alive the charter and franchises of the railroad company and from time to time to elect officers and directors for the railroad company, but such officers and directors so elected are always officers, directors or employees of, and subservient to the railway company and under its dominance and control.

Tenth. Under the 1896 plan the so-called deposit of $10 and $15.00 by railroad stockholders was not authorized or required by the directors or stockholders of the railroad or railway companies or by a Court but was required only by the Syndicate Members and the Managers, and the deposits went solely to the Syndicate Members for their expenses and profits, without any benefit or advantage to the creditors or stockholders of the railroad company or to the railway company or to rehabilitate the railroad company; it was just another scheme to illegally and unlawfully bleed the stockholders of ready cash so the Syndicate Members would not have to put up any cash of the cash they were required to put up under their agreement. [872]

The Managers did not, as J. P. Morgan testified, have to seek members for the Syndicate but men were seeking to obtain the "privilege" of becoming a Syndicate Member. For the syndicate agreement

of March 16, 1896, see JCC Part 5, page 2826, Ex. "M" to the Bill.

No member of the Syndicate ever paid in one cent on the transaction but the Syndicate received and divided among its members $16,814,662.77 as commission and $3,712,752.77 as profits, making a total of $20,527,415.54.

It was further provided in the Syndicate Agreement that the Reorganization Managers should offer to the depositing holders of the old common stock of the Northern Pacific Railroad Company at $15 per share new common stock to the amount of 490,000 shares, being share for share for all the old common stock said to be outstanding. If all this new stock so to be offered to depositing holders of old stock had been taken it would have exhausted $17,619,200 of the new preferred stock and $66,619,200 of the new common stock provided to be sold under Clause I. This would have left to the Syndicate $10,880,900 par of the new common stock at $15 per share without the deposit or surrender of any old stock, and also $1,148,700 of the new preferred stock at $10 per share without the deposit or surrender of any old stock. That is to say, the Syndicate got $10,880,900 of common stock for $1,632,135 and $1,148,700 of preferred stock for $114,870.

The old railroad company common shares deposited with payment of $15 cash per share amounted to 348,528 shares, on which there was

paid the assessment of $15 per share, or..... $5,227,920
and out of 352,384 outstanding shares of the old railroad company preferred stock there were depositing stockholders to the extent of 336,263 shares who deposited their old stock and paid the assessment of $10 per share, amounting to..... 3,362,630

making the total of cash paid in by depositing stockholders holding old stock..... $8,590,550

[873]

This left untaken by the holders of old stock 8,060 shares of new preferred stock and 149,532 shares of new common stock, all of which was likewise delivered to the Syndicate at $10 per share for the allotment on account of unassenting old preferred stock (16,120 shares)..... $ 161,200
and $15 per share for the allotment on account of unassenting old common stock (141,472 shares) 2,122,080

Total..... $2,283,280

These additional shares..... $ 806,000
new preferred stock and..... 14,953,200

new common stock of the par value of..... $15,759,200
were also taken by the Syndicate at cost of ..... $ 2,283,280

Thus of the new stock the Syndicate acquired:

Of new preferred stock	$ 1,148,700	for $ 114,870
Of new common stock	10,880,900	for $1,632,135
And additional new preferred stock	806,000)	) for 2,283,280
And new common stock	14,953,200)	
Total new stock	$27,788,800	for $4,030,285

New stock of the par value of	$27,788,800
was acquired by the Syndicate for	4,030,285
or at a sum less than par amounting to	$23,758,515

In the Syndicate contract of March 16, 1896, paragraph 7, it is provided that the new stock is to be offered to the stockholders of the Northern Pacific Company whilst the assessments are to be paid by stockholders of the Northern Pacific Railroad Company. There is nothing in any of the agreements or negotiations to show who or what the Northern Pacific Company was or is. It is one phase of the transaction still secreted and covered up by the officials of [874] the railway company as part of its illegal and unlawful scheme set out herein, and which petitioners after diligent efforts and research have not been able to discover and unravel.

Eleventh. That the entire stock issued by the said Wisconsin corporation, known as the Northern

Pacific Railway Company, is held and possessed by a Voting Trust organized in 1896 and originally composed of J. Pierpont Morgan, George von Siemens, August Belmont, Johnston Livingston and Charles Lanier, who manage said company and elect the directors thereof, and who, as such Voting Trustees, are, and have been, practically in entire control of the property and assets of the Northern Pacific Railroad Company so illegally and unlawfully acquired in the name of the Northern Pacific Railway Company with knowledge of all the facts herein alleged.

That Brayton Ives, August Belmont, George R. Sheldon and Charlemagne Tower, Jr., directors and "Stockholders' Protective Committee" of the said Northern Pacific Railroad Company, have by the means herein recited, thus acquired unto themselves as owning and controlling the said Northern Pacific Railway Company, a transfer of all of the property and assets of the said Northern Pacific Railroad Company, and in consideration of said transfer, and as a part of the price therefor, they did, in the year 1896, cause the said Wisconsin corporation, known as the Northern Pacific Railway Company (formerly the Superior & St. Croix Railroad Company), to issue one hundred and fifty-four millions, nine hundred and ninety-five thousand, seven hundred dollars ($154,995,700) of its capital stock to the said Voting Trustees, who hold the same with full knowledge and notice of all the facts herein averred.

That the said Voting Trustees have issued to certain of the stockholders of the said Northern Pacific Railroad Company voting trust certificates for the majority of the stock so issued by the Wisconsin corporation, the Northern Pacific Railway Company, but [875] that upwards of eighteen millions of dollars of the capital stock of the said Wisconsin corporation, issued as part of the price and consideration for the transfers to it as trustee of the assets and property of the Northern Pacific Railroad Company, remains in the hands of the said Voting Trustees or under their control and if the transfer or exchange of securities was legal and valid, which is denied, that then the said $18,000,000 of said capital stock of the railroad company is the property of the said Northern Pacific Railroad Company for the benefit of its non-assenting stockholders including these petitioners, but that the said Voting Trustees refuse to account for the same to the said railroad company or its non-assenting stockholders, and the said Voting Trustees and the said railway company illegally and unlawfully holding all of the property, assets and securities of the railroad company illegally and unlawfully taken over by them in 1896 refused to account for same and to return same to the said railroad company. (Paragraph 21 of this petition).

Twelfth. The railway company in its first annual report after the so-called 1896 foreclosure or reorganization stated that its stocks and bonds were issued in exchange for the Northern Pacific Rail-

road Company property and that it, in this exchange, obtained title and possession of property worth $21,183,000 more than the par value of its said stocks and bonds so issued in exchange therefor. The report says in part:

> "Upon September 1, 1896, the Northern Pacific Railway Company entered into possession of the Railroad, lands and appurtenant property that had been purchased at foreclosure sales. In exchange for the property thus acquired and unified in the present Northern Pacific system, the Railway Company issued
>
> $155,000,000 of Capital Stock, and
> 129,816,500 of Mortgage Debt
>
> ---
>
> $284,816,500 total issue as of September 1, 1896."

With the bonds and stock thus issued, every dollar of mortgage and other indebtedness of the railroad company was covered, all the reorganization expenses were paid, every assenting stockholder was [876] settled with, all the appropriations stipulated for in the plan were made, and there was still left of this purchase price over Eighteen Millions of the common stock (to say nothing of bonds and preferred stock) which has been appropriated by the syndicate of which the president and directors of the old company were members.

By the agreement of July 13, 1896 between J. P. Morgan & Company, Reorganization Managers, and

the railway company the stocks and bonds of the railway company purport to be issued in consideration of the stocks and bonds of the railroad company.

In the Reorganization Plan of March 16, 1896 it was stipulated that the bonds and stocks of the new company should be issued

> "as a consideration for the property and securities to be conveyed or delivered to the new company or which pursuant to the Plan, the new company shall acquire." (Page 12)

Thirteenth. Referring to Paragraph 44 of the cross bill these petitioners further allege that Section 10 of the Act of July 2, 1864 incorporating the railroad company provides "and no mortgage or construction bond shall ever be issued by the said company on said road or mortgage or lien made in any way except by the consent of the Congress of the United States."

The Joint Resolution of May 31, 1870 provided that the railroad company "is authorized to issue its bonds to aid in the construction and equipment of its road and to secure the same by mortgage on its property," etc. Section 10 was a prohibition and the Joint Resolution was a limited release therefrom and it used words in the singular and it is not necessary to apply them to things in the plural to carry out the intent of the statute as the clear intent of the statute was only to provide for one mortgage sufficient to aid in the construction and

equipment of the road (First National Bank v. Missouri, 263 U. S. 640; 68 L. ed. 486). The extent of the power of the railroad company is to be measured by the terms of the Federal [877] statute relating to the railroad company and they can rightfully exercise only such as are expressly granted or such incidental powers as are necessary to carry on the business which they establish, but an incidental power can avail neither to create powers which expressly or by reasonable implication are withheld nor to enlarge powers given but only to carry into effect those powers which are granted (First National Bank vs. Missouri).

When the mortgage of July 1, 1870 under the above Joint Resolution was executed, experts made estimates for the railroad and for Congress and the mortgage so executed was sufficient to construct and complete the railroad as planned, and as it was constructed and completed, and there was no intention or expectation of another mortgage being necessary or desirable. The Act and the Joint Resolution clearly limit the power of the railroad to one mortgage but where a statute making a grant of property or powers or franchises to a private individual or private corporation becomes the subject of construction as regards the extent of the grant, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the Government or the general public. Oregon R. & N. Co. vs. Oregonian Ry. Co., 130 U. S. 1, 26;

32 L. ed. 837, 842. Charles River Bridge v. Warren Bridge, 11 Pet. 420; 9 L. ed. 773.

The words "successors and assigns" in Sections 2 and 3 of the Act of 1862 and omitted in Section 7 and other sections and not put in the Joint Resolution of May 31, 1870, are surplusage and do not carry the power to sell or assign or have a foreclosure of the mortgage, certainly without the consent of the United States (Oregon R. & N. Co. vs. Oregonian Ry.).

The execution of the mortgage of July 1, 1870, under the facts alleged and the public record, exhausted the grant under the Joint Resolution for when a charter power (to mortgage) is once exhausted it is in respect to further contracts and rights as though it had [878] never been granted and there could be no further mortgage under that Joint Resolution (E. T. V. & G. Ry. Co. vs. Frazier, 139 U. S. 288; 35 L. ed. 196).

In 1896 the officials of the railway company, practically all of whom were also officials of the railroad company, and the Reorganization Managers, were so doubtful that they could maintain that more than one mortgage was authorized and valid and that any and all of the mortgages in the foreclosure suits were valid, as the Joint Resolution used the words "the mortgage" twice, "said mortgage" once and "such mortgage" once, that they used every effort to prevent the Federal Court in Wisconsin from deciding the question that was squarely presented

to the Court and continued by decrees without being determined and which was never determined. The jurisdiction of the Court likewise never was determined.

There is doubt in the construction of the Joint Resolution of 1870, which doubt must be resolved against the railroad company and in favor of the Government and public, whether or not the Joint Resolution permitted a mortgage on the right of way granted by section 2 of the Act of July 2, 1864.

Petitioners are advised and so charge that the facts and law determined by the Supreme Court in Northern Pacific Railway Co. vs. Townsend, 190 U. S. 267; 47 L. ed. 1044, also resolved the doubt against the grant as authorizing a mortgage on the right of way of the railroad company by finding and stating:

> "Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered (New Mexico v. United States Trust Co., 172 U. S. 171, 181, 43 L. ed. 407, 410, 19 Sup. Ct. Rep. 128; St. Joseph & Denver C. R. Co. v. Baldwin, 103 U. S. 426; 26 L. ed. 573), it must be held that the fee passed by the grant made in Section 2 of the act of July 2, 1864. But although there was a present grant, it was yet subject to condition expressly stated in the act, and also (to quote the language of the Baldwin Case) 'To those necessarily implied, such as that the road

> shall be * * * used for the purposes designed.' Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose,—one which [879] negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

Bonds of the railroad company issued and secured under the mortgage of July 1, 1870 were after the claimed and so-called foreclosure of 1875 carried as "assets" in the railroad company's balance sheet of September 20, 1876 and were carried as "securities owned" and held as muniments of title in the report of June 30, 1898 of the railway company.

The mortgage of 1870 provided for $50,000 for each mile of the 2500 mile line—a total of $125,000,000—of which approximately $30,780,904 were issued.

The inconsistencies and changeableness of the railway company to suit its purposes in carrying out and covering up and secreting the fraud, collusion and false representations of the 1896 fake foreclosure and so-called reorganization is typified in the following letter written on its behalf by a director and general counsel of the railway company :

"Nor. Pac.

7.3% Bonds of 1870. 28 February, 1908

Messrs. Charles Fearon & Co.,
Philadelphia, Pennsylvania.

Dear Sirs:

Mr. George H. Earl, Secretary of the Northern Pacific Railway Company, has handed me your two letters of February 19 and February 25 in this matter.

The mortgage securing the 7.3% bonds of 1870 of the Northern Pacific Railroad Company was foreclosed in 1875. The property of the Company was sold in the foreclosure action, and was acquired by a reorganization committee, and subsequently was vested in the reorganized company, of which the preferred stock was issued to the holders of the 7.3% bonds as provided in the plan of reorganization. As a result of this reorganization, the only interest in the property retained by the holders of the 7.3% bonds was that represented by preferred stock of the reorganized company received by

such bondholders as availed of the reorganization plan. [880]

In 1896, the Northern Pacific Railroad was again sold in foreclosure proceedings, and was purchased at the sale by the present Northern Pacific Railway Company. The proceeds of the sales did not equal the indebtedness, and the equity of the stockholders of the insolvent company was extinguished.

There exists now no fund or property applicable to the payment of the 7.3% bonds of 1870, and the status of a holder of any such bonds at the present time will become apparent to you upon consideration of that fact.

Faithfully yours,
(s) FRANCIS LYNDE STETSON
General Counsel in New York"

Practically all of the 7.3% bonds of 1870, which were turned in under the 1875 proceedings, were deposited, not cancelled, with the Farmers Loan & Trust Company of New York.

Francis Lynde Stetson, general counsel and a director of the railway company on or about December 14, 1903 filed in the Supreme Court of the United States in Northern Securities Company vs. United States a brief on behalf of members of the firm of Morgan & Company who had been "managers" under the reorganization, in which it is stated:

"The Northern Pacific Railway Company was formed in 1896, upon a reorganization of the Northern Pacific Rail Road Company. Its

capital stock consisted of $75,000,000 preferred stock and $80,000,000 common stock, and the charter provided that the preferred stock might be retired at par on any first day of January up to 1917."

Thus ignoring the old Superior and St. Croix Railroad Company's charter and admitting that the railway company was a new organization of some kind or character formed and established in 1896. This is evidenced by the fact that in the mortgages executed during or after 1896 by the railway company they were careful to insert a provision that no recourse upon the mortgages or the bonds issued thereunder shall be had against "any incorporator, stockholder, officer or director" of the corporation or organization executing the mortgage. The so-called mortgages of the railway company during or after 1896 were admittedly not to "aid in the construction and equipment of the road." [881]

The railroad company stock as testified to by Stetson, general counsel and director of the railway company, was not transferred on the books to the railway company until after the null and void act of Wisconsin of April ....., 1897, pretending to authorize the railway company to buy another railroad at a judicial sale; this act was null and void because it was an indirect attempt to amend the charter of the railway company which could not be done by a direct amendment.

Fourteenth. The Morgan Plan and Agreement for Reorganization stipulated that depositors there-

under should "sell and assign" their deposited stock and bonds to J. P. Morgan & Co., Reorganization Managers, who were to exercise all rights of ownership over the same, and who were authorized to proceed to re-organize "with or without foreclosure" it being provided that "for all purposes the property and the securities representing the property might be treated as identical."

The exchange of securities on July 13th, 1896 practically effectuated the re-organization or re-adjustment "without foreclosure"—subject only to the claims of those not assenting.

After the execution of this agreement of July 13th, 1896, and prior to the so-called judicial sale of July 25th, 1896, the officers of the Wisconsin corporation filed in Montana a statement under oath hereinelsewhere set out.

The railway company at the time and afterwards construed the transaction to be merely an exchange of securities or a sale of securities of one company for the securities of the other and without reliance on the so-called fake foreclosure, as the purchase price was the price set out in the reorganization agreement. Francis Lynde Stetson, general counsel for and director of the railway company in 1903 testified:

> "Q. 90 Mr. Stetson, I call your attention to page 13 of the first annual report of the Northern Pacific Railway Company, where it stated that the Northern Pacific Railway Company had issued its capital stock [882] and mortgage

debt or bonds, and had received from Messrs. J. P. Morgan & Company, as reorganization managers,—

	$3,674,913.20	in cash and
	1,325,086.80	in $2,210,000 General Lien Bonds at about 60%
Constituting the	$5,000,000.00	Betterment and Enlargement Fund
	10,500.00	Prior Lien Bonds,
	440,000.00	General Lien Bonds,
	4,086,300.00	Preferred Stock, and
	2,500,000.00	Common Stock.

Were those securities of stocks and bonds part of the consideration which the company had issued for the property and franchises of the federal corporation and which were thus turned back to it by J. P. Morgan & Company?

A. So I assume.

Q. 92 So that part of the price, to the extent there set forth, that the Wisconsin corporation had paid for the property and franchises of the federal corporation to J. P. Morgan & Company, was thus turned back to the Wisconsin corporation by J. P. Morgan & Company?

A. They were thus delivered by J. P. Morgan and Company to the Wisconsin corporation."

He further testified that the securities or some of them so returned were used in the acquisition of the Seattle, Lake Shore and Eastern Railway, which became a part of the Northern Pacific System.

The railway company is estopped to claim that they took title under the foreclosure or that the foreclosure proceedings were valid or passed any title, for the railway company filed itself and had filed for the railroad company an answer in United States vs. Northern Pacific Railway Company, 134 F. 715, in which it is alleged among other things as follows:

> "And these Defendants aver that the said Northern Pacific Railway Company never received any subsidy in land, bonds, or any loan of credit from the United States for the construction of any railroad or telegraph lines; that the said Northern Pacific Railway Company is not engaged in operating its said railroad or telegraph lines under any right or franchise derived from the Government of the United States or from any Act of Congress, but owns, operates and maintains the said line of railroad and telegraph under and by virtue of the laws of the State of Wisconsin, under which it was incorporated and organized, and the laws of the several States in which the lines of railway and telegraph are situate, and so these Defendants say that the said Northern Pacific Railway Company is not subject to the provisions of the said Act of Congress of August 7th, 1868."

In the railway company's answer in the Boyd suit, sworn to June 26, 1907 by George H. Earl,

Secretary, it is alleged that the receivers of the railroad company "took possession of the said railroad franchises and assets of the said railroad company" and it further alleged [883] that there was a valid foreclosure in 1875, and:

> "That its capitalization was increased to $155,000,000 and that duly and lawfully it did obtain, and does now hold, a majority of the outstanding and issued stock of the Northern Pacific Railroad Company, and also substantially all of the franchises, property and assets which were formerly of the Northern Pacific Railroad Company, except as from time to time portions of the land grant have been sold and disposed of."

In December, 1901 the railway company filed an answer in the case of Hackett vs. Northern Pacific Railway Company in the Supreme Court of New York sworn to by George H. Earl, Secretary, in which it stated:

> "In July, 1896 this defendant"—meaning the Superior & St. Croix Railroad that was—"at judicial sale purchased the railroad franchises, immunities and other property of the Northern Pacific Railroad Company, a corporation organized under the laws of the United States, with the consent of the State of Wisconsin, at a time when the respective railroads of this defendant and of the said Northern Pacific Rail-

road Company could be lawfully connected and operated together to constitute one continuous main line."

Fifteenth. Referring to Paragraphs 49 and 50 of the cross bill, these petitioners further allege that the railroad company during all of 1895 and 1896 and for a long time prior thereto was the owner of 3800 shares of the stock of the Superior and St. Croix Railroad Company, the Wisconsin corporation herein called the railway company. The original subscription list of the Superior and St. Croix Railroad Company shows that in November, 1871 H. S. Walbridge, H. D. Walbridge, Walbridge Bros. and Sargent, and John R. Sargent subscribed to the capital stock of the said company for "3800 shares —$380,000," and the certificates were issued in November, 1872. The said Superior and St. Croix Railroad Company reported to the Railroad Commissioner of Wisconsin that on these 3800 shares there had been paid in during the year 1871 the 10% required or $38,000, and in 1872 the payment thereon amounted to $56,560.

On July 29th, 1873 the transfer was made upon the books and new certificates for the 3800 shares were issued to the Northern Pacific Railroad Company, each certificate bearing this endorsement: [884]

"I hereby certify that the within paid up certificate ..... of the Capital Stock of the Superior and St. Croix Railroad Company is entitled to representation and dividends of earn-

ings only to the extent and in the amount that the bonds money labor or other considerations now paid or to be paid for such stock shall be actually applied in the construction of the branch or extension of the Superior & St. Croix R. R. Company or in the procurement of right of way & Depot Grounds. Reference is hereby made to the 'Twelfth Article' of the Agreement made and entered into between said Superior & St. Croix R. R. Co. and the Northern Pacific Railroad Company bearing date the 26th day of June, 1873.

September 4, 1873.

(Signed) HIRAM HAYES,
Secty. Sup. & St. Croix R. R. Co."

That in 1895 Hayes went around and bought up the other 44 shares of the stock of the railway company and delivered them endorsed in blank to Spooner, who was attorney for the railroad company, at Spooner's request.

In an affidavit filed in the case of Mylrea, Attorney General, vs. Superior & St. Croix Railroad, 93 Wisconsin 604; 67 N. W. 1138, by Hiram Hayes, Secretary of the company, and on its behalf, it was stated that the 3800 shares had been subscribed.

The charter of the railway company gave a vote to all "subscribed" stock; stock subscribed and partially paid for, although not delivered, could be voted; in the so-called void amendment of 1895 the right to vote was given to stock "subscribed and outstanding." Francis Lynde Stetson, general coun-

sel and director of the railway company, testified and admitted that the said $56,560 had been paid on the purchase price of this stock prior to July 21, 1873.

These petitioners on information allege that there was no meeting of the stockholders of the railway company after these 3800 shares of stock were transferred to the railroad company until August 31, 1880, on which latter date the railroad company, through its authorized official and general counsel, George A. Gray, voted the stock and elected directors and officials of the railroad company as directors and officials of the railway company, and there was no other meeting of the directors or stockholders of the railway company until October [885] 18, 1895 and there was no meeting of the directors of the company between June 26, 1873 and August 31, 1880.

Prior to February 16, 1882 Hiram Hayes, secretary of the railway company, had been employed as attorney and agent for the railroad company and in the minutes of the railroad company of February 16, 1882 appears this action:

> "The general counsel was authorized to increase the compensation of Colonel Hiram Hayes of Superior City, Wisconsin, as attorney and agent of this company in Wisconsin to Two Hundred Dollars ($200.00) a month commencing on the first day of January last."

At the meeting of the stockholders of the railway company July 1, 1896 the only shares present, being

43, were voted by H. C. Reed (a secretary in the office of John C. Spooner), A. L. Sanborn (a law partner of Spooner), and John C. Spooner, who was an attorney for the railroad company and for the receiver of the railroad company. No notice was given of the meeting to the railroad company, which held and owned the 3800 shares above mentioned of the stock of the railway company nor was it present, nor was any notice given to any of the receivers, nor were they present.

The same was true as to the meeting of the stockholders of the railway company on October 18, 1895. There being no meeting of the stockholders and directors of the railway company between August 31, 1880 and October 18, 1895, there was no authority for the application claimed to have been made by Hiram Hayes for the so-called void amendment of the charter of the railway company of April 19, 1895, which was sought to be confirmed at the illegal meeting held October 18, 1895, as Hiram Hayes did not prepare it nor have knowledge of its preparation and did not see it until after its enactment and it was prepared by John C. Spooner.

Hayes testified in a suit in which the railway company was a party that he was secretary of the Superior & St. Croix Railway Co. until February ....., 1895. On May 4, 1895 he gave the order for the [886] delivery to Spooner by the bank of the 3800 shares of stock of the railway company owned by the railroad company "for transmission to me," which was after the time that he testified he was secretary of the railway company. Hayes further

testified that Spooner was not "acting as the attorney" of the Superior & St. Croix Railway Company in the matter of withdrawing the 3800 shares of stock of the railway company from the First National Bank of Madison, Wisconsin in 1895, which was the property of the railroad company.

Sometime in 1895 before August, Spooner wrote a report for someone on the Superior & St. Croix Railroad Company, in which he stated:

> "I ought to add, although out of its order, that February 3, 1872, an annual meeting of stockholders was held, and the meeting adjourned without electing directors. The next meeting of stockholders was held August 31, 1880, at Superior. Col. George Gray was appointed chairman and Hiram Hayes, secretary. This meeting was duly called. The stockholders proceeded to the election of nine directors. Gates, Morrison and Bardon were chosen inspectors, and the election was had by ballot; 3,812 shares of stock were voted, and the following board was elected, each receiving 3,812 votes except Hiram Hayes, who was evidently too modest to vote for himself; Frederick Billings, Charles B. Wright, Johnston Livingston, George Gray, H. E. Sargent, Irvin W. Gates, Hiram Hayes, H. W. Shaw and James Bardon. Thereupon the meeting adjourned.
>
> "It is evident that the 3800 shares voted at this meeting, notwithstanding they had not been earned, and were not the property of the

Northern Pacific Railroad Co. and contained on the back a provision that they did not entitle the holder to representation. The 12 shares voted in addition were, however, valid shares."

But, if 44 shares were the only valid outstanding or subscribed shares, still 12 shares did not constitute a quorum under the charter.

Petitioners are informed, believe and so charge that as part of the fraudulent unlawful schemes in this petition alleged the railway company and the Reorganization Managers had Hiram Hayes write a letter full of false statements as follows:

"Madison, Wisconsin, Feby. 14, 1895

First National Bank,
Madison, Wis.,

Gentlemen:

As Secretary of the Superior & St. Croix Railroad Company, I have to request that you will deliver to me the 3800 shares of stock numbered as follows: certificates numbered 20, 21, 22, 23, 24 and 25 for 500 shares each, and certificate No. 26 for 800 shares of the capital [887] stock of the Superior & St. Croix Railroad Company, delivered to you on the 6th day of September, 1873, to be held in escrow under agreement, a copy of which is in your hands, between the Superior & St. Croix Railroad Company, the Northern Pacific Railroad Company, Walbridge Brothers and Sargent, and the County of Douglas.

This stock you will see was to be delivered to the Northern Pacific, together with the bonds of Douglas County, which were deposited with you upon the terms provided in the agreement. You will recollect that suit was afterwards brought by Douglas County to cancel its subscription to the capital stock, to secure a return of the bonds, and to have declared void the agreement. The Northern Pacific was made a party, also the Superior & St. Croix Railroad Company, and all others interested. The case went to the Supreme Court of the State of Wisconsin, which held the agreement void in all its parts, and decreed a surrender of the bonds. See case reported in 38 Wis. 179.

The bonds were delivered by you to the Clerk of the Court, and they were cancelled. The stock which was to be part payment for the road under the agreement, also ceased to be capable of being earned by the Northern Pacific. It never built a mile of road under the agreement, and has no claim whatever to or ownership in the stock. The Company owns no property, railroad or otherwise. There could be no better evidence of the fact that there is no vested ownership of or interest in this stock than that the matter has remained quiescent, without an inquiry even, for over twenty years. Indeed it was in oblivion in the old archives of the bank, and the fact that the bank had ever received it had been forgotten by its officers,

and after a copy of the bank's receipt for it was exhibited, it was insisted by the officers that it was not in its custody. It has been, except by the Company whose capital it is, utterly abandoned. It has never been paid for in any way. It was to be paid for by a railroad which has never been constructed under the agreement. There is no claim of pretence to the contrary, and never can be, for the agreement itself was held void. No other contract ever was made, and the agreement under which this stock is held by you is that which was held to be void in all its parts.

I am picking up, as Secretary of the Company, the outstanding stock for cancellation. You will remember that the Northern Pacific was a party to the litigation and bound by the decision, which was by the Supreme Court, and therefore final.

I will arrange for the payment to you of the One Hundred Dollars for the keeping of the stock, and have executed, and enclose herewith, a receipt for the stock.

Yours very truly,

HIRAM HAYES,

Secretary, Superior & St. Croix R. R. Co."

J. H. Sargent and Horace S. Walbridge of the firm of Walbridge Bros. and Sargent, were directors of the railway company in 1871 and on December 20, 1871 H. S. Walbridge was elected president of the railway company. [888]

Sixteenth. The railroad company under its charter and the laws of Congress had no authority to and could not lease or convey or by any other contract turn over its entire road and property to another corporation nor could it lease or convey or by any other contract turn over its road and property in the State of Oregon unless it was specifically authorized by the statute creating it to do so; nor could the railway company receive the property of the railroad company by any of the means above mentioned in the State of Oregon under the law and facts determined in Oregon Railway and Navigation Company vs. Oregonian Railway Company, 130 U. S. 1; 32 L. ed. 837 (1888), quoting Thomas vs. West Jersey Railroad, 101 U. S. 71; 25 L. ed. 950; Pennsylvania R. Co. vs. St. Louis, etc. Co., 118 U. S. 290, 309; 30 L. Ed. 83, 92, and many English and American cases.

This decision prohibited the exchange of stock or so-called reorganization or void foreclosure of 1896 of the railroad company not only in the State of Oregon but also in the States of Wisconsin, Minnesota, Montana, Idaho and Washington. The Oregonian Railway Company was organized under the laws of Scotland and the Oregon Railway & Navigation Company under the laws of the State of Oregon. In Oregon Railway & Navigation Company vs. Oregonian Railway Company it was contended that leases and acts ultra vires of the charter and statute could not be attacked by the railroad companies but would have to be by the state, which contention

was not sustained but overruled. The Supreme Court in Thomas vs. West Jersey Railroad Company above found and stated:

> "That principle is, that where a corporation like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in the case of R. R. Co. v. Winans, [889] 17 How. 30, 15 L. ed. 27. The corporation in that case was chartered to build and maintain a railroad in Pennsylvania by the Legislature of that State. The stock in it was taken by a Maryland corporation, called the Baltimore and Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it, and furnished the rolling stock. In reference to this state of things and its effect upon the liability of the

Pennsylvania corporation for infringing a patent of the defendant in error, Winans, this court said: 'This conclusion (argument) implies that the duties imposed upon plaintiff (in error) by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But these acts involve an overturn of the relations which the charter has arranged between the Legislature and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse, required for public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration for their grant. The corporation cannot absolve itself from the performance of its obligation without the consent of the Legislature. Seman v. Rufford, 1 Sim. (N. S.) 550; Winch v. R. Co., 13 L. & Eq. 506.'

"And in the case of Black v. Canal Co., 7 C. E. Green, 130 (22 N. J. Eq. 130), Chancellor Zabriskie says: 'It may be considered as settled that a corporation cannot lease or alienate any franchise or any property necessary to perform its obligations and duties to the State, without legislative authority.' For this he cites some ten or twelve decided cases in England and in this country."

In Osborn v. United States Bank, 9 Wheat. 738, 823, the Court found and determined:

> "The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not itself the mere creature of a law, but all its actions and all its rights are dependent on the same law."

In California v. Central Pacific R. Co., 127 U. S. 1 at 40; 32 L. ed. 150 at 157 (cited and quoted in Paragraph 55 of the cross bill) the Court found and determined:

> "Generalized and devested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the

> public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot [890] be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry or railroad, or charge tolls for the use of the same, without authority from the Legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

Neither the railroad company nor its property or stock could be taken, received or held by the railway company without the consent of the United States, even if the railway company had authority to so take, hold and receive it, which latter authority is denied.

The title to this railroad, telegraph line and land grant is now claimed by the Northern Pacific Railway Company, a Wisconsin corporation, incorpo-

rated in 1870 under the name of the Superior and St. Croix Railroad Company to build a local line of railroad in Wisconsin.

Under the Wisconsin law and decisions railroad corporations chartered in that State are deemed strictly private and local corporations, formed for purposes of private gain.

The distinction between such Wisconsin corporations and the Northern Pacific Railroad Company and the facts both are determined and found by the Court in Roberts vs. Northern Pacific R. R. Co., 158 U. S. 1; 39 L. ed. 873 (April 22, 1895), where, after quoting from the Congressional Charter Act of 1864 as to the declared public purposes for which the latter corporation had been created, the U. S. Supreme Court said:

> "It is obvious that the effect of this legislation of Congress was to grant the power to construct and maintain a public highway for the use of the people of the United States, and subject, in important respects, to the control of Congress. That portion of its road that lies within the State of Wisconsin is of the same public character as the portions lying in other States or Territories. Whatever respect may be due to decisions of the Courts of Wisconsin defining the character and powers of Wisconsin corporations owning railroads, the scope of those decisions cannot be deemed to include the case of a national highway like that of the Northern Pacific Railroad Company. All of the

great transcontinental railroads were constructed, under Federal authority, through Territories which have since become States. Such States are possessed of the same powers of sovereignty as belong to the older States. Hence, if the contention were true that the State of Wisconsin, through its judiciary, can deprive that portion of the railroad within its borders [891] to its national character, and declare the Northern Pacific Railroad Company to be a private corporation not engaged in promoting a public purpose, the same would be true of the other States through which the road passes. Such a contention, we think, cannot be successfully maintained. * * * We think, therefore, that when the Circuit Court of the United States for the District of Wisconsin was called upon, in the present case, to pass upon the character, powers and rights of the Northern Pacific Railroad Company, it was bound to regard that company as a corporation of the United States created for national purposes, and as a means of interstate commerce and not to apply to it the views of the Wisconsin Courts pertaining to their local railroads.

"Upon the principle of these cases it is obvious that the state of Wisconsin at least after it had given its consent to the Northern Pacific Railroad Company to enter into its territory and construct its road, and such consent had been acted on, could not by hostile legislation,

hamper and restrict that company in the management and control of its railroad, nor by judicial decisions of its courts transform a corporation formed by national legislation for national purposes and interstate commerce into one of local character, with rights and powers restricted by views of policy applicable to state organizations."

John C. Spooner was attorney for the railroad company in this case.

There was no authority in the Act of Congress of 1864 for the transfer of the properties or the stock of the railroad company as it was transferred and juggled in 1896 nor was there any authority in the Act of Wisconsin for the railroad company to take and receive same. The invalid and illegal amendment of the charter of the railway company of April 15, 1895 did not empower or authorize the railway company to take or receive same (as alleged hereinelsewhere this amendment was approximately six months before there was any authority for the amendment to be sought or obtained), as there was no meeting of the railway company from August 31, 1880 until October 10, 1895, which latter meeting was illegal and void.

In Case vs. Kelly, 133 U. S. 21; 33 L. ed. 513, the Supreme Court found and determined that a Wisconsin railroad corporation had no authority under the laws of that State to receive an indefinite quantity of lands whether by purchase or by gift

for use in the construction with no limitation upon their use or upon their sale, but that such railroad company is limited to the lands necessary to such use as are appropriate to the operation of its railroad, being its right of way, terminals and stations.

The laws construed in Case vs. Kelly were the same ones in effect in 1896 and the Court stated: [892]

> "It is not pretended that there is any general statute of the State of Wisconsin which authorizes either this Company or any other corporation to purchase and hold lands indefinitely, as an individual could do, without regard to the uses to be made of such real estate. The charter of the Company, approved April 12, 1866, chapter 540, authorizes it to acquire real estate, namely, the fee simple in lands, tenements and easements, for their legitimate use for railroad purposes. It is thus authorized to take lands 100 feet in width for right of way, and also such as is needed for depot buildings, stopping stages, station houses, freight-houses, warehouses, engine-houses, machine-shops, factories and for purposes connected with the use and management of the railroad. This enumeration of the purposes for which the corporation could acquire title to real estate must necessarily be held exclusive of all other purposes, and as the court said at the time of making its interlocutory decree, 'it was not authorized by its char-

ter to take lands for speculative or farming purposes.'

"It must be held, therefore, that there was no authority under the laws of Wisconsin for this corporation to receive an indefinite quantity of lands, whether by purchase or gift, to be converted into money or held for any other purpose than those mentioned in its Act of incorporation."

It is contended in this case that the court could not decide the question but it would have to be raised by a writ of quo warranto, but the Court held and said:

"It has no authority by the Statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the Company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the Company in violating the law, and enabling the Company to do that which the law forbids."

The Court held that it would assist in taking away from the railroad company rights and property already obtained by ultra vires acts in the Oregon Railway & Navigation case above. In the suit at bar the railway company is not only seeking to retain lands to which it claims to have obtained the title from the railroad company, but is also seeking other lands or the value of same, in which the title is still in the United States and has not passed to either the railroad company or the railway company and title to which the railway company cannot receive, take or hold under the laws of Wisconsin, Minnesota and the other states traversed by the Northern Pacific Railroad Company system. [893]

The Reorganization Managers, Syndicate Members, officials and directors of the railroad and railway companies and others associated with them in their schemes and plans known as the Reorganization Proceedings and fake foreclosure of 1896, which were conducted for their own personal profit, benefit and aggrandizement, having difficulty with the titles and being advised of the defects and lack of legislative authority in the said proceedings, sought and secured the Act of 1897 of the Legislature of Wisconsin (see Digest of Wisconsin Statutes, Vol. 1, page 1352), which act in effect was and was intended to be an amendment of the charter of the railway company and an increase of its powers and rights and to apply only to the railway company. It was and is absolutely null and void and in

contravention of the Constitution of Wisconsin and in contravention of the principles declared binding on the railroad corporation in Roberts vs. Northern Pacific Railroad Company, 158 U. S. 1; 39 L. ed. 873 quoted above in this paragraph. The said act is as follows:

> "Any such railroad corporation may give or take, lease or sell or purchase from any railroad company or at any judicial sale, within or without the state, and give or take a conveyance or assignment of the railroad, franchises, immunities, together with the appurtenances and all other property and the stock or bonds or both thereof of any other railroad corporation, whether organized or created by the laws of this State or of any other state or of the United States, or any portion thereof, within or without this state when their respective railroads can be lawfully connected and operated together to constitute one continuous main line, or when the road so purchased will constitute branches or feeders of any railroad maintained and operated by such purchasing corporation or when the road so purchased is one which any such company is authorized by its charter to build, maintain and operate; and may purchase and hold the stock or bonds of any railway company to which it has furnished the money for the construction of its railway, or purchase for the money so furnished or for such other consideration as may

be agreed upon between the companies, by their respective boards of directors, and take a conveyance of the whole or any portion of the franchises of said corporation and of the railway property and appurtenances thereof, and all acts, purchases, whether at judicial sale or otherwise, and all conveyances heretofore made by any railway company organized under the laws of this state which are authorized by this section and all conditions and agreements upon which the stocks of any such corporation have been and are to be issued, relating to voting power, dividends and trustees, between different classes of stock or otherwise, are hereby legalized, ratified and confirmed; provided, that nothing herein contained shall be construed to legalize any contract or indenture of lease heretofore entered into between a corporation of this state and any corporation organized or created by the laws of the United States. But no railroad corporation shall [894] consolidate with, or lease or purchase, or in any way become owner of or control any other railroad corporation or any stock, franchises, rights or property thereof, which owns or controls a parallel and competing line, to be determined by jury."

In 1896 there was a provision in the Wisconsin statutes providing that:

"No railroad corporation shall consolidate with or lease or purchase or in any way be-

come owner of or control any other railroad corporation or any stock, franchises, rights or property thereof which owns or controls a parallel and competing line."

On July 1, 1896 the railway company did not own or was not operating any railroad but between July 1st and its reorganization agreement of July 13, 1896 and the foreclosure on July 25, 1896 the railway built the three mile line described below from the Minnesota State line east into and through the town of Walbridge, which was parallel to the railroad's track and on the land of the railroad. The Act of April 18, 1899 providing that any railroad corporation with the approval of the majority of the shares of its capital stock may purchase at judicial sale the property, franchises, etc. of any insolvent railroad corporation contains this altered proviso:

"provided that the railroad so purchased shall not be parallel or competing with any constructed railroad owned or controlled and operated by the purchasing corporation, and shall be a continuation of, or be connected with, or intersected by, a line of railroad owned, leased or operated by such purchasing corporation, or which it shall be authorized to build."

Petitioners are advised by Wisconsin attorneys and so charge that the Wisconsin Acts of 1897 and 1899 are invalid and void as contrary to the Wis-

consin Constitution, Article 4, Section 18, which forbids any act containing two subjects. The so-called reorganization and fake foreclosure of 1896 was invalid and void as to the railroad property and stock securities in the State of Minnesota, and the railway company and railroad company are estopped to deny such invalidity thereof by Pearsall v. Great Northern Railway Company, 161 U. S. 646; 40 L. ed. 383, where the Court found and determined:

> "This was a bill in equity filed by Pearsall, a stockholder in the Great Northern Railway, against the company, which is a corporation created and existing under the laws of the territory and state of Minnesota, and a citizen of that state, to enjoin it from entering [895] into and carrying out a certain agreement between that company and the holders of bonds secured by the second and third general mortgages, and the consolidated mortgage of the Northern Pacific Railroad Company, under which, upon a sale and foreclosure of the mortgages given to secure such bonds, the holders were to purchase or cause to be purchased, the property and franchises of the Northern Pacific Railroad Company."

The Court held that an arrangement by which a railroad company in return for a guaranty, turns over to a trustee for the entire body of stockholders of another company owning a parallel road one-half of its stock, with an agreement contemplating

an interchange of traffic and the use of terminal facilities, and with the almost certainty that the complete control of the former will be obtained by the latter company—is in violation of a law prohibiting railroad corporations from consolidating with, leasing, or purchasing, or in any other way becoming the owner of or controlling, a parallel or competing line.

The amended Wisconsin Constitution of 1871 provides:

> "The Legislature is prohibited from enacting any special or private laws in the following cases:
>
> * * * * * * *
>
> 7th. For granting corporate powers or privileges except for cities."

This Constitution doesn't just prohibit amendment of charters but prohibits all "special or private" "corporate powers or privileges" using the word "or" twice, thus disjoining "special" and "private" and also "powers" and "privileges." Authority to increase the railway company stock from $5,000,000 to $155,000,000 was a "corporate power" granted and not just a "privilege" as Chicago City Ry. Co. vs. Atherton, 18 Wall. 233; 21 L. ed 902 determined that an increase of capital is "organic and fundamental."

Seventeenth. At a meeting of the directors of the railway company June 5, 1873, there was some change in the location of the line along the Bay of Superior to Connor's Point.

On the cancellation of the agreement between Walbridge Bros. & Co. and the railway company on June 26, 1873 the railway company and the railroad company entered into an agreement whereby the railroad [896] company was to build the proposed railroad for the railway company on the line located at the meeting of the board of directors June 5, 1873 from the Bay of Superior to the point of connection with the Northern Pacific Railroad in the County of Carlton, State of Minnesota, which was Thompson's Junction.

Just when the railroad company began work on this and how much they did, these petitioners are not informed sufficiently to allege but the report of the railway company for the year ending December 31, 1873 reported:

"Length of main line from Superior to State line of Wisconsin and Minnesota	15 3/5 miles
From state line to Northern Pacific Railroad Junction in Minnesota	9 miles
Total	24 3/5 miles"

and the same amount was reported for the year ending December 13, 1874.

The railroad company having become the owner of 3800 shares of the stock of the railway company in 1873, the remaining 44 shares were, as these petitioners are informed and charge, mostly owned by officers or directors of the railroad company.

In 1880 the railroad company voted the said 3800 shares of stock of the railway company and shortly thereafter built or completed the railroad from Thompson's Junction to Superior and to Connor's Point as covenanted for June 26, 1873 along the identical line located by the railway company.

In the early eighties the Northern Pacific built or completed the road of the Superior & St. Croix Company and adopted such road as part of its own main line and from that time the Superior & St. Croix ceased to keep up any separate corporate existence.

The following is the announcement made in the local paper in Superior, Wisconsin at the time this building was being arranged for:

(From the "Superior Times" of Saturday, September 4, 1880)

"RE-ORGANIZATION OF THE SUPERIOR & ST. CROIX RAIL ROAD COMPANY

This company was re-organized on Tuesday last by the election of the following directors and officers: [897]

Frederick Billings, President,
Irvin W. Gates, Vice-President,
Hiram Hayes, Secretary and Treasurer,
Charles B. Wright, Johnston Livingston, George Gray, H. E. Sergeant, James Bardon and H. W. Shaw,—Directors.

The Company has a special charter to build a line from Superior to the St. Croix, with a

branch from Superior westward to the State line. It was on this branch that Mr. Walbridge partially constructed the line from Superior towards the Northern Pacific Junction in 1872. The Charter passed virtually into the control of the Northern Pacific Company in 1873, just before the panic.

The recent re-organization was made, we believe, with the view that the charter would be of assistance to the Northern Pacific in getting connections with its main line when it extends eastward through Wisconsin. Colonel Gray, the Attorney of the Northern Pacific, was present at the meeting."

James Bardon, one of the directors above named of the railway company and who was the publisher of the Times, personally at Superior in 1902 verified the truthfulness of the statement set forth in the above announcement.

Charles B. Wright mentioned above as a director of the railway company, was for many years president and director (director from 1870, vice president from 1873, president from 1874 to 1879) of the railroad company about the same time and refused to turn in his 500 shares of preferred and 100 shares of common stock of the railroad company in 1896 or to assent to the reorganization and proceedings of 1896 for the reason, as he stated, that being familiar with the early history of both roads and all the transactions of the railroad, the stock

would continue to have value and land value, of which the so-called reorganization and fake foreclosure could not divest it, and he requested his heirs and administrators to hold the stock and not sell it for the same reason, as these petitioners are informed, believe and so charge.

The Wisconsin Special Statute of March 25, 1872, chapter 139, referring and applying to the Northern Pacific Railroad Company and the Federal Charter of the latter company, authorized this consolidation to be made, it aiding in the construction of the main line of railroad contemplated by Congress. Section 2 of this act is as follows: [898]

> "Section 2. A purchase by the Northern Pacific Railroad Company of, or the consolidation of its line with any other railroad whose line shall conform to the route above prescribed, shall, for the purposes of this act, be deemed equivalent to a construction by said Northern Pacific Railroad Company of its said railroad, for such distance as the road so purchased or consolidated with shall be constructed on said route."

The 24 3/5 miles location of the railway company complied with the above route.

The decision in Williams vs. Southern New Jersey R. R. Co., 26 N. J. Equity, 398, is ample authority that the conduct of the parties here was sufficient to work a consolidation even though no formal agreement of consolidation was recorded with the

State authorities. Cox vs. Midland Railroad Company, 31 N. J. Equity 105, held a railroad company may lose its location by allowing another railroad to use and occupy the land included in such location.

Prior to January, 1873 the State of Wisconsin brought a suit against the railroad company to prevent the road from cutting out Superior and making its main line to Duluth, which suit was settled or compromised in an agreement between the railroad company and Governor Washburn of Wisconsin in 1873, and in Volume 1, page 363 of the director's records of a meeting of the board of directors of February 13, 1873 the following is found:

> "President Cass stated to the board the arrangement which he had made under the instruction of the executive committee with Governor Washburn, of Wisconsin, for the settlement of the suit brought by that State to remove the dyke from Superior Bay. It is contained in the following letter which was read to the board,—
>
> 'New York, January 28, 1873
>
> Hon. C. C. Washburn,
> Governor of Wisconsin.
>
> Dear Sir:
>
> The Northern Pacific Railroad Company will agree to build a branch from the main line of the Lake Superior and Mississippi Railroad, from Duluth across Rice's Point and Con-

nor's Point and along the shore of the Bay of Superior to the Nemadji river—the line to be located with a view to economy of construction and connecting with wharves and docks in said Bay, with such necessary station houses as may be needful for the business of the town of Superior—the road to be completed within eight months from the day when a deed shall be delivered to this Company for the right of way, and all station grounds and wharf frontage needed for the present and future business of the Northern [899] Pacific Railroad. The right of way herein mentioned is, from Connor's Point to the Nemadji River, including the right to construct a bridge across the channel between Connor's and Rice's Points.

In conducting the business of the road the Northern Pacific Railroad agrees to place Duluth and Superior on such equal footing, as will leave the commercial world to elect for itself where it will do business, without any discrimination in favor of either place, delivering passengers and freight both at Superior and Duluth.

And the railroad further agrees to erect grain elevators in Superior or permit private parties to do so; and if private parties shall so erect elevators on the line of the railroad, the Company agrees to deliver to the elevators all the grain which may be consigned to them.

G. W. CASS,

President, &c.' "

After this adjustment Douglas County donated certain lands to the railroad company for the construction of the 24 3/5 miles that it constructed from Thompson's Junction to Superior, Connor's Point and Rice's Point (see Act of Congress February 27, 1873, 17 Stats., 77). The section from Superior City to the Minnesota State line cost upwards of $500,000 and the Connor's Point branch cost upwards of $90,000. The item in the consolidated balance sheet of the railroad company filed by the receivers showing the condition of the trust estate October 31, 1893 was "Sundry branch roads and surveys $263,441.05" included the railroad built by the railroad company under the contract with the railway company on the line located by the railway company from Thompson's Junction to Superior and Connor's Point.

A public meeting was held in the Court House at Superior in October, 1880, which was called to order by James Bardon, one of the directors of the railway company, at which H. W. Shaw was chosen chairman, and Hiram Hayes, secretary of the railway company and an attorney and agent of the railway company, I. W. Gates, a director and stockholder of the railway company, James Seyer and other officials of the railway and railroad companies made speeches, after which the following resolution was passed:

> "Resolved that we learn with great satisfaction of the efforts being made by the non-resident owners to secure a railroad for Superior,

and that their action has our cordial approval, and that we promise them our hearty co-operation in their efforts looking to the [900] end in view. Resolved, that we desire and are anxious to see the railroad line extended from the Nemadji River up along or near the westerly shore of the Bay of Superior to the northerly end of Connors Point on the line located by the Superior & St. Croix Company in 1873 and afterwards adopted by the Northern Pacific Company, and that owners of property to be directly benefited by such extension should be solicited at once for contributions to encourage the construction of same."

Hiram Hayes, secretary of the railway company, made an affidavit in the case of Mylrea, Attorney General v. Superior & St. Croix Railroad Company in part as follows: "That on or about the month of May, 1872 the said Walbridge Brothers and Sargent failed and stopped work on the construction of the proposed railroad, discharged their men and never afterwards resumed work" on their contract with the railway company, and the affidavit shows that they had not built any road for the railway company. The annual report of the railway company for the year ending December 31, 1872 did not report any road built or operated.

The railway company officials, or rather the inside officials, knew that the 24 3/5 miles from Thompson's Junction to Superior and Connor's

Point was built by the railroad company on the identical line or route located by the railway company, being the line or route on which the railroad company was to build the road for the railway company, but in 1896 they secreted or hid and prevented and have ever since prevented these petitioners and all others from seeing the records of the railroad company and the railway company on this matter, and having hidden, secreted and kept covered up the said records in 1896 the said railway company in July built 3 miles east from the Minnesota State line through Walbridge parallel to and on the north of the line built by the railroad company in 1880 from Thompson's Junction to Superior and crossed it to the south of Walbridge. This line was 150 feet from the center of the roadbed of the line the railroad built in 1880 or 1881 and the right of way of same was 100 or 200 feet on either side. This three mile stretch was built by the inside group of the railway company and railroad company in 1896 for the purpose of trying to make their illegal and unlawful reorganization and fake foreclosure valid and legal. [901]

In taking the depositions in the Hoover case in 1903 Francis Lynde Stetson, director and general counsel for the railway company, conceded for the purposes of that case, that the line of the railroad built by the railroad company under agreement with the supervisor of Douglas County was built by the Northern Pacific Railroad Company upon the lines located in 1871 and 1873 by the Superior and St. Croix Railroad Company.

At a later date after Engineer W. L. Darling had testified that he was unable to say that the road so built by the railroad company in 1880 was not the identical line located by the railway company in 1871 and 1873, Mr. Bunn, attorney for the railway withdrew the concession, but this was before Mr. I. S. P. Weeks, another engineer for the railroad and railway companies, testified that his recollection was that the route built by the railroad in 1880 and 1881 was the line located by the railway company in 1871 and 1873, and he remembered when they were building the road that it was right on the openings that had been cut some years previous thereto, which was the location of the line of the railway company.

The line built by the railroad company from Thompson's Junction to Superior and another piece built by the railroad to and along Connor's Point were both on the road or line located by the Superior & St. Croix Company, and these petitioners are informed, believe and charge that the lines so built from Thompson's Junction to Superior and Connor's Point on the line located by the railway company and covered by the contract between the railroad and railway companies was in May, 1882, by action of the board of directors of the railroad company, adopted as part of the main line of the railroad company.

When the suit of Douglas County vs. Superior & St. Croix Railroad Company (the railway company) and the railroad company, 38 Wisc. 179, to

cancel the county bonds, which were issued without statutory authority, was filed and service by publication was had as to the railroad, Hiram Hayes, who was secretary of the railway company and [902] attorney and agent for the railroad company brought the suit to the attention of President Cass of the railroad company and seemingly recommended a defense, but President Cass and the railroad company refrained from in any way appearing or taking part in the suit because, as petitioners are advised, believe and charge, the railroad company had entered into an arrangement or agreement with Douglas County whereby the county was to donate and convey to the railroad company lands of the county and which were actually donated by the county to the railroad in lieu of or to take the place in whole or in part of the void Douglas County bonds, which bonds the Court afterwards declared void and cancelled.

There was no order or decree in this suit cancelling or voiding the 3800 shares of stock owned and held by the railroad company in the railway company, but while the bonds were declared void, yet in the suit by consent certain bonds and other remunerations were allowed to Walbridge Brothers and Sargent, but as far as the record shows the 3800 shares of stock of the railroad company were left the property of the railroad company.

Johnston Livingston, who was a stockholder and director in the railroad company in 1880 and 1881 and, as petitioners are informed, a director of the

railway company about that time and until 1896, testified in 1903 that he did not know that the Superior & St. Croix Railroad Company was the Northern Pacific Railway Company in 1896 that became a party to the reorganization.

Because of and in view of the apparent ownership of the railway company by the railroad company in 1873 and all times thereafter and the building by the railroad of 24 3/5 miles from Thompson's Junction to Superior and Connor's Point on the identical line located by the railway company in 1871 and 1873, along which the railroad company was to build the railroad for the railway company, and the absorption of the railway company by the railroad company as hereinbefore in this paragraph set out, a paragraph was put in the Voting Trust Agreement of December 1, 1896, which provided: [903]

> "The term Northern Pacific Railway Company for the purposes of this agreement and for all rights thereunder including the issue and delivery of stock shall be taken to mean either the Wisconsin corporation of that name created by Chapter 326 of the Private and Local Laws of Wisconsin, passed 1870, and the Acts supplemented thereto, or any successor or consolidated or other railroad corporation, which with the unanimous approval of the voting trustees, shall be adopted to own or operate the railroad properties acquired under the said reorganization plan and agreement dated March 16, 1896 and to carry said agreement into fuller effect."

These petitioners are informed, advised and charge that the officials and directors of the railroad and railway companies and other parties to the reorganization and the fake foreclosure of 1896, as various of them stated at the time, felt that the said so-called reorganization and fake foreclosure was or would be held and treated by the Courts as well as the United States to be invalid and void and that no title or right of possession to any of the land, property, stocks, assets, securities or bonds had passed from the railroad company and this voting trust was organized and the above paragraph inserted in it to enable the trustees under the voting trust to resume the conduct of the property under the name and charter of the railroad company without any further proceedings whatever; this Court can now and it is its duty to declare and decree that title to and right to possession of all the lands, properties, franchises, assets, stocks, bonds and securities of the railroad company unlawfully taken into custody and possession, as hereinbefore alleged, by the railway company and the voting trustees, was in 1896 and has been at all times and still is in the railroad company.

Although the railway attorneys filed an answer for the railroad company disclaiming any interest, yet it has put evidence in the record in this cause showing so many of the illegalities and wrongs committed in 1896 that the Court cannot make a true, just, equitable and complete decision and decree

without determining most, if not all, of the very questions raised in this petition and the cross bill. The railway company having thus presented the matter, such determination is mandatorily required by the statute of June 25, 1929. [904]

This statute provides a special and specific remedy for all the parties named in the suit and in these petitioners and any others coming under the terms of the statute to determine all questions and issues named in the statute free of any and all defense of laches, multifariousness or quo warranto, a proper remedy, as well as any technical defense.

In 1896 the officials of the railroad and railway company and the Reorganization Managers and members of the Syndicate believed and maintained and until about 1924 still believed and maintained that the foreclosure of 1875 was a valid foreclosure that passed title and possession of all the property out of the Federal corporation under the charter of the railroad of July 2, 1864 and accordingly they did not use that charter or reorganize under it or under whatever organization they thought the railroad was then being operated. Therefore, in 1896 they sought a new Federal charter from Congress to, in effect, revive the old railroad charter for reorganization but failing to get this, they hurriedly cast around for any kind of charter or company they could find and could control and they took up and used the railway company's so-called charter.

Since about 1924 the railway company officials and those associated with them, as above, have been advised by learned counsel, in whose advice they had

confidence and followed, that the 1875 proceeding was not a foreclosure and title and possession of the property, lands and assets of the railroad company did not pass out of it, but the same was continued and held in the possession and ownership of the railroad company.

Some years afterwards J. P. Morgan, the dominating figure in the 1896 proceedings herein described and one of the Voting Trustees, testified and admitted under oath that in 1896 the purchaser was the "old company"—the Northern Pacific Railroad Company, so petitioners are informed, believe and so charge. [905]

Eighteenth. The three so-called mortgages which were purported to be foreclosed in the fake foreclosure proceeding in 1896 in the United States District Court for the Eastern District of Wisconsin were known as the General Second Mortgage dated November 20, 1883, recorded in Volume 2, page 433 in the Interior Department, Third Mortgage dated December 1, 1887, recorded in Volume 1, page 181, and Consolidated Mortgage, dated December 2, 1889. All of these mortgages were executed after the railroad company's railroad and telegraph line had been fully built and completed in September, 1883, and could not have been used to aid in the construction and equipment of same.

The General First Mortgage dated January 1, 1881, recorded in Volume 2, page 371, set out in the fake foreclosure proceedings, was satisfied of record and released on November 17, 1899. The Missouri Division Mortgage, dated May 1, 1879, recorded in

Volume 2, page 255, was satisfied and released of record on July 2, 1900. The Pend d'Oreil Division Mortgage dated September 1, 1879, recorded in Volume 2, page 291, was satisfied and released of record July 2, 1900. In each of these so-called mortgages, the plan of reorganization of 1875 is recited together with the averment that the mortgage is executed with the voted consent of three-fourths of the preferred stockholders as provided by that plan.

Nineteenth. In the different suits filed in the United States Circuit Court for the Eastern District of Wisconsin by W. C. Sheldon & Co. and by the Farmers Loan & Trust Company and others, which were consolidated into the fake foreclosure suit, the Court was entirely without jurisdiction of the subject matter and all the proceedings therein were therefore null and void, and further, all the proceedings were by consent of the parties to the illegal and unlawful reorganization and fake foreclosure of 1896.

In a suit by the Farmers Loan & Trust Company against the railroad company and others in the United States Circuit Court for the District [906] of Washington in which that Court held (69 F. 871) that the Wisconsin Court was without jurisdiction, Brayton Ives, president of the Northern Pacific Railroad Company and on its behalf, in an affidavit seeking to have the receivers removed, stated as follows:

> "And deponent avers that no part of the railroad or land grant of the Northern Pacific

> Railroad Company was or ever has been situated within the Eastern District of Wisconsin, and that at the time of said appointment of said Receivers by the Circuit Court of the United States for the Eastern District of Wisconsin, there was no property of said Northern Pacific Railroad Company situate within the jurisdiction of said court, and that no part of the property covered by the mortgages to foreclose which said bill was filed and recited therein, and in aid of which said Receivers were so appointed, was situate within the said District."

All the land and property and assets of the railroad company in the State of Wisconsin were in the Western District of Wisconsin and none was in the Eastern District of Wisconsin.

The United States Court in Minnesota dismissed a suit of the creditors and stockholders as without jurisdiction. The purpose of these suits in Wisconsin, Minnesota, Washington and the other states traversed by the railroad company was to stop and forestall Brayton Ives, who was president, and his associates from taking over control of the board of directors and the property of the railroad company, which control they were just about to obtain.

Because of differences of opinion in the different districts a friendly petition by consent was presented to the four associate justices of the Supreme Court of the United States who were assigned to the four circuits traversed by the railroad company, seeking to have the Wisconsin Court made the

primary court. The ruling and order thereon reported in 72 F. 30 made by the four justices, who were not legally sitting as a Court, seems to have been had solely because desired and agreed to by all parties to the record. The order made, it will be perceived, is confined to the foreclosure and no mention is made of the creditors' bills; yet there were vast land grants east of the Missouri River, several million acres in Minnesota and large acreages in North Dakota, all of which were expressly exempt from the [907] operation of the mortgages. In the opinion of three of the justices they state:

> "In expressing these views, we are not to be understood as passing upon the proposition advanced in argument, but not necessary to be here considered, that it is competent for a circuit court of the United States, by consent of parties, to foreclose the mortgage of a railroad, no part of which is within the territorial jurisdiction of such Court."

Mr. Justice Brown's opinion was that the Wisconsin Court had no jurisdiction to foreclose the mortgage but he acceded to the wishes of the others as a matter of expediency.

The decree of foreclosure directed a sale under the mortgages, of stocks, bonds and other property in the hands of the receivers which were not in any way covered by the mortgages.

This was entirely independent of the separate decrees directing sales to the new company by the

receiver of securities pledged for Receiver's Certificates and Collateral Trust Notes.

In the Reorganization Plan and Statement it is set forth that the lien of the 2nd and 3rd mortgages is only upon the main line, the Cokedale Spur, ½ of the line, Carlton to Duluth, and upon the Land Grant, yet in entering the decree it is declared that the 2nd mortgage is a lien not only upon those things but "upon all the stocks and bonds in other companies owned by the defendant, "The Northern Pacific Railroad Company, at the time of the appointment of receivers . . . October 13th, 1893, other than stocks and bonds, pledged under the Consolidated Mortgage, and all the right title and interest of said defendant . . . in such pledged stocks and bonds, subject to the rights of the pledgees thereof."

The sale was decreed accordingly under the mortgage.

These decrees were consent decrees, acquiesced in by the Directors and "Protective Committee" of the railroad company in furtherance of the unlawful plan to acquire the property of the railroad company for the railway corporation. [908]

The lands and land grants west of the Missouri River and covered by the terms of the mortgage were sold under a supplemental decree in a manner directly contravening the resolution of Congress, under which it is contended, the mortgages were executed, and also contravening the Act of Congress of March 3rd, 1893.

These lands are upwards of thirty millions of acres, and are worth many millions of dollars.

The resolution of Congress of 1870 stipulated as follows:

> "If the mortgage hereby authorized shall at any time be enforced by foreclosure, . . . or the mortgaged lands hereby granted, or any of them, be sold . . . such lands shall be sold at public sale at places within the states and territories in which they shall be situate after not less than sixty days previous notice, in single sections or subdivisions thereof to the highest and best bidder."

By Section 1 of the Act of Congress of March 1st, 1893, it is provided:

> "That all real estate or any interest in land sold under any order or decree of any United States Court, shall be sold at public sale at the court house of the county, parish, or city in which the property or the greater part thereof is located, or upon the premises, as the court rendering such order or decree of sale may direct."

The following and other violations of the law were had in these proceedings:

First: All the lands, patented and unpatented, were sold in but one place in each of the states in which the lands were situated, and not in the respective counties where situated.

Second: The lands for which patents had not been issued were not sold in single sections or sub-divisions, but were sold lumpingly at the place in each State as above stated, for the sum of $500,000 for the lands in each State.

To acquire the remaining lands in Minnesota and North Dakota, east of the Missouri River, and not covered by the mortgages, the same being expressly exempt,—the railway company experienced great difficulty and had to wait three years until 1899 when a null and void order to sell in sequestration proceedings was made upon the Petition of the Receivers. The Receivers took the precaution to have sales made in each county of the State, but the unpatented, unsurveyed and [909] unlocated lands were sold lumpingly and not in single sections or sub-divisions. "With respect to lands it is quite certain that sequestrators acquire no title and hence can make no sale." Freeman on Executions, 125(a). A receiver in sequestration proceedings acquires no title to the real estate and has but a right to the possession. Forster v. Townsend, 48 N. Y. 203.

After acquiring the property, thus sold, the new company obtained two further and separate decrees, one in August, 1896, decreeing a sale to it for the face value of the outstanding receiver's certificates (all of which it held), of all the securities—millions in value of excess—deposited as collateral for the payment of such certificates—and one other decree in October 1896 of all the securities (over 33 millions in value) deposited as collateral for the payment of

the Collateral Trust Notes which amounted to but 10 millions of dollars, and all of which were deposited with the Reorganization Managers under the Reorganization Plan to be settled for by the payment of but 7% in cash and the balance in bonds and stock of the new company.

These were collusive and illegal consent decrees and at the time practically the same directors acted for both companies. The railroad company lost—the railway company profited to the extent of many millions of dollars by the transactions.

Lack of jurisdiction by the Court can be attacked collaterally and the Supreme Court in Thompson vs. Whitman, 18 Wall. 457; 21 L. ed. 897 found and determined that neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, or the Act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered. The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. Want of jurisdiction may be shown, either as to the subject-matter or to the person, or in proceedings in rem as to the thing. [910] By a law of New Jersey, non-residents were prohibited from raking clams and oysters in the waters of that state, under penalty

of forfeiture of the vessel employed; and any two justices of the county in which the seizure of the vessel should be made were authorized, upon information given, to hear and determine the case; held that if the seizure was not made in the county where the prosecution took place, the justices of that county had no jurisdiction, and that this fact might be inquired into in an action for making such seizure, brought in New York, notwithstanding the record of a conviction was produced, which stated that the seizure was made within such county.

In a petition sworn to by the receivers of the railroad company dated September 3, 1897 filed in the United States Circuit Court for the Eastern District of Wisconsin it is stated that the lands of the grant in Minnesota and North Dakota east of the Missouri River amounted to 3,738,874 acres and cited the general first mortgage, the amount of which on March 6, 1896, according to the plan, was $41,879,000. By another fraudulent, consent and collusive decree of April 27, 1899, and a decree amending it November 25, 1899 (JCC 1441-45), this plan of sale was arranged by the group controlling the then railway system as part of its fraudulent and collusive scheme to capture, hold and prevent anyone else from buying and purchasing lands of the railroad company as no one could buy one or more single sections without taking it subject to the $41,879,000 of the first trust, as there was no arrangement under the trust or in the decree or proceedings whereby single or group sections could be re-

leased from the trust. The sale under these decrees was not carried out according to and was in contravention of the charter and the statutes, and the sale having been made to the railway company, the Court, on affirming the report, entered a deficiency judgment of "more than $87,000,000" in favor of the railway against the railroad.

These 3,738,874 acres were sold for $837,850 and the railway paid in cash because it was required to make a deposit of 10% at the [911] sale in the amount of $83,785, leaving a balance on the purchase price of $757,075, which the Court allowed it to offset against the deficiency judgment for more than $87,000,000, leaving a balance on the deficiency judgment of "more than $86,242,925."

This judgment was fraudulent and obtained under an unlawful and illegal consent and collusive decree on bonds of the railroad company which had been paid and satisfied in the purchase price under the so-called reorganization plan and the railway company had issued its new bonds in lieu of same and had certified to those taking the bonds and the public, to whom the bonds were offered, that the bonds of the railway company so issued were first liens on the property of the railroad company.

This so-called fraudulent and collusive judgment of a balance of more than $86,242,925 was taken in part for the purpose of trying to hold or establish some kind of lien on the lands and property of the railroad company, as the parties to the said collusive agreement and decrees realized that they did

not pass valid title from the railroad company to the railway company.

The so-called foreclosure sale in 1896 likewise was fraudulently and collusively arranged so that all of the lands and property of the railroad company described in the decree would be sold subject to the then first mortgage, and the portion covered by the Missouri Division would be sold subject to the first mortgage and the Missouri Division mortgage which amounted at that time to $1,815,500. The land covered by the Pend d'Oreil was sold subject to the first mortgage and to the Pend d'Oreil mortgage, which then amounted to $357,000, thus making it imperative that all the land be bought by one person or corporation, and that settlers, individuals and smaller corporations could not buy part without taking it subject to and being liable for the first mortgage and, if covered by them, the Missouri Division mortgage and the Pend d'Oreil mortgage.

[912]

Charles Donnelly, president of the railway company (formerly general counsel of the railway company) testified before the Joint Congressional Committee and stated that the stockholders of the railway company were substantially the same as those of the railroad company and that the holders of securities of the railway company were substantially the same as those who had held the securities of the railroad company. He also stated, seemingly in contradiction of the company's answer in the case of United States vs. Northern Pacific Railroad Com-

pany, 134 F. 715 (Paragraph 16 above), that the "obligations of the new company imposed by the original act, of course—the obligations imposed by the original act upon the old company do, of course, rest upon the new company. Whatever the old company had to do we had to do." (The old company was the railroad company, the new company the railway company.)

James B. Kerr, who was for many years attorney for the railway company and represented it before the Joint Congressional Committee (Part 2, page 892) in discussing 93 U. S. 442, admitted that under the railroad company act of July 2, 1864 the railroad became, in a sense, an agency of the Government and the Government reserved the right to amend the charter.

In United States vs. Northern Pacific Railway Company, 256 U. S. 51, the bill alleged:

> "That the defendant, Northern Pacific Railway Company, is the assignee and successor in interest of the said Northern Pacific Railroad Company, to any and to all the properties, lands, rights, grants, privileges and franchises granted to said Northern Pacific Railroad Company by the Act of July 2, 1864 and by all acts supplemental thereto."

And the answer of the railway company admitted:

> "It is true that the Defendant is a corporation and is the assignee and successor in interest of the—etc."

The main line from Ashland to Wallula, the Cascade Branch, Pasco to Tacoma, Portland to Tacoma and Bridges was 2,133.1 miles and cost $67,271,-251.78, so these petitioners are informed (JCC, Part 4, pages 2021-22). [913]

Under the so-called and fake foreclosure decree in 1896 Commissioner Cary sold at one place in Wisconsin on July 25, 1896, 8,632.50 acres of patented and certified lands in Wisconsin for $4100, which was 44¢ per acre, and he also sold all of the unsurveyed and unidentified lands in Wisconsin as one parcel for $500,000 to the railway company.

On July 29, 1896 he sold at Missoula, Montana, 5,298,598.67 acres of patented and certified lands in Montana for $937,900, which was 17¢ per acre, and all of the unsurveyed and uncertified lands in Montana as one parcel for $500,000 to the railway company.

He sold in North Dakota 2,072,504.9 acres of patented and certified lands for $343,900, which was 16¢ per acre, and he also sold all of the unsurveyed and unidentified lands in North Dakota as one parcel for $500,000 to the railway company.

He sold in Idaho 234,808.46 acres of patented and certified lands for $50,400, which was 21¢ per acre, and he also sold all of the unsurveyed and unidentified lands in Idaho as one parcel for $500,000 to the railway company.

He sold in Oregon 313,583.91 acres of patented and certified lands for $58,800, which was 16¢ per acre, and he also sold all of the unsurveyed and un-

identified lands in Oregon as one parcel for $500,000 to the railway company.

He sold in Washington 6,360,958 acres of patented and certified lands for $1,210,100, which was 19¢ per acre, and he also sold all of the unsurveyed and unidentified lands in Washington as one parcel for $500,000 to the railway company.

This makes a total acreage sold in the six states of patented and certified lands of 14,289,086 acres at $2,605,200 or 18¢ per acre and all the unsurveyed and unidentified lands in the six states for $3,000,000. All of these lands were sold subject to the

first mortgage of	$41,879,000
Part of the lands subject to Missouri Division Mortgage	$ 1,815,500
Part of the lands subject to Pend d'Oreille Mortgage	$ 357,000
Total mortgages	$44,051,500

[914]

As part of the fraudulent and illegal scheme of officials of the railway and railroad companies and the Reorganization Managers these lands were sold without any provision in the decree, the mortgage or proceedings for the release of any acre or section or part of any tract in any state or all the states from any or all of these mortgages on behalf of any independent purchaser; this was done so as to make it imperative for the railway company and no one else to buy, as there was no other organization, corporation or association that was authorized under

the laws of the United States and of the various states that could buy the entire property.

For this reason the property by consent was sold thus, so these petitioners are informed, believe and charge, and it is more than probable that the Court did not understand the circumstances and conditions and situations.

At the time of the sales the railway company made the 10% deposit required, but it was made in second mortgage bonds of the railroad company, and these petitioners are informed, advised, believe and charge that only the said 10% of the purchase price of the above described acreage of 14,289,086 acres and all of the unsurveyed and unidentified lands in the six states was ever actually paid by the railway company, although it was agreed that the full purchase price could be in second mortgage bonds of the railroad company. No actual cash was paid by the railway company in the 10% deposit or otherwise. These sales were not in good faith and bona fide in accordance with the Joint Resolution of May 31, 1870. At the time of the sales the railway company had, as hereinbefore stated,

General Second Mortgage Bonds of the Railroad Company	$19,078,000
General Third Mortgage Bonds of the Railroad Company	11,267,000
Consolidated Bonds of the Railroad Company	44,923,000
Total	$75,268,000

Yet, as hereinelsewhere alleged, the railway company took an unlawful, illegal, invalid and void judgment by collusion and consent [915] against the railroad company for "more than $87,000,000." The sales of the land in Minnesota and North Dakota under the decree of 1899 were made three a day in different counties at 9:00 A. M., 2:00 P. M. and 4:00 P. M., which was illegal, invalid and void as the first and last hours were unreasonable times.

These petitioners are informed, believe and charge that all of the sales by Commissioner Cary in 1896 and 1899 were fake, fictitious, and perfunctory performances and no one sale lasted more than one-half hour, although several million acres were sold in each of three of the sales.

James B. Kerr, attorney for the railway company in the hearings before the Joint Congressional Committee, testified in the hearings as follows:

> "Senator Kendrick: Mr. Kerr, when those lands were sold under that foreclosure, where did the title to them then rest?
>
> Mr. Kerr: In 1875?
>
> Senator Kendrick: No; I mean in 1896.
>
> Mr. Kerr: It rested in the purchaser, which was the reorganization committee, made up of the representatives of the holders of bonds and securities of the old Northern Pacific Railroad Co. They acquired title to them, and when the sale was affirmed, what they purchased at the foreclosure sale was conveyed to them, or assigned by them to the Northern Pacific Rail-

way Co., and the special master and the receivers and the railroad company itself, under the direction of the court, made deeds to the Northern Pacific Railway Co., the Wisconsin corporation."

This evidences that there were secret agreements, arrangements, plans and transactions in 1896 in the so-called reorganization and fake foreclosure that are still secreted, hidden and covered up by the officials of the railway company and other parties thereto.

The plan of reorganization provides that the assenting stockholders of the railroad company were to assign their stock to the Reorganization Managers as co-partners and there may have been an undisclosed agreement, arrangement or plan for the partnership or some other partnership to take over all the assets and properties under the name of Northern Pacific Railway Company.

Twentieth. These petitioners change the word "some" to the word "any" in the line reading as follows: "The property of some of the mortgages or the United States" so that it will read "The property of any of the mortgages or the United States" in line 11 of the second [916] paragraph of Paragraph LI of the cross bill filed by these petitioners on behalf of the railroad company in this suit.

An act in the Minnesota General Laws of 1879, page 87, is as follows:

"An Act to facilitate the operation and construction of the Northern Pacific Railroad.

Section 1. The Northern Pacific Railroad Company shall have the right and authority under and pursuant to the general laws of this State, as set forth in sections numbered thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty (30), and thirty-one (31) of title one (1), of chapter thirty-four (34) of the General Statutes (Revision of 1866) as amended by chapter fifty-three (53) of the General Laws of one thousand eight hundred and seventy-two (1872), and chapter fourteen (14) of the General Laws of A. D., one thousand eight hundred and seventy-five (1875), to condemn for public use and to acquire and hold all the real estate and property that are or may be needed by said company for right of way, depot grounds, engine houses, machine shops, and for all other purposes for which such real estate or property is or may be needed by said company in the operation or construction of any line or lines of railroad, including not only all lines of railroad that have been or may be constructed or acquired by said company, but also all other lines of railroad that now are or may hereafter be operated either entirely or in part by said company, under any lease, contract or other arrangement between said company and any other party or parties.

Sec. 2. This act is hereby declared to be a public act, and shall take effect and be in force from and after its passage.

Approved February 14, 1879."

Twenty-one: If this Court should happen to hold against the contention of these petitioners that the so-called reorganization proceedings and fake foreclosure were null, void and illegal, unlawful and fraudulent, then these petitioners and others similarly situated who have been co-operating with them are entitled to relief in the alternative. The United States Supreme Court in Southern Pacific Co. vs. Bogert, 250 U. S. 483; 63 L. ed. 1099 found and determined as follows:

"First. The Southern Pacific contends that plaintiffs are barred by laches. The reorganization agreement is dated December 20, 1887; the decree of foreclosure and sale was entered May 4, 1888; the sale was held September 8, 1888; and the stock in the new company was delivered to the Southern Pacific on February 10, 1891. This suit was not begun until July 26, 1913; and not until that time was there a proper attempt to assert the specific equity here enforced; namely, that the Southern Pacific received the stock in the new Houston Company as trustee for the stockholders of the old. More than twenty-two years had thus elapsed since the wrong complained of was committed. But the essence of laches is not merely lapse of

time. It is essential that there be also acquiescence in the alleged wrong, or lack of dili- [917] gence in seeking a remedy. Here plaintiffs, or others representing them, protested as soon as the terms of the reorganization agreements were announced; and ever since, they have with rare pertinacity, and undaunted by failure, persisted in the diligent pursuit of a remedy, as the schedule of the earlier litigation referred to in the margin demonstrates. Where the cause of action is of such a nature that a suit to enforce it would be brought on behalf not only of the plaintiff but of all persons similarly situated, it is not essential that each such person should intervene in the suit brought in order that he be deemed thereafter free from the laches which bars those who sleep on their rights. Cox vs. Stokes, 156 N. Y. 491, 511, 51 N. E. 316. Nor does failure, long continued, to discover the appropriate remedy, though well known, establish laches where there has been due diligence and, as the lower courts have here found, the defendant was not prejudiced by the delay."

* * * * * * *

"Because of such wide divergence the earlier decrees do not operate as res judicata. And there is no basis for the claim of estoppel by election; nor any reason why the minority, who failed in the attempt to recover on one theory, because unsupported by the facts, should not be permitted to recover on another for which the

facts afford ample basis. William W. Bierce v. Hutchins, 205 U. S. 340, 347, 51 L. Ed. 828, 833, 27 Sup. Ct. Rep. 524."

* * * * * * *

"Third. The Southern Pacific challenges the claim for relief on the ground that it took the new Houston Company stock, not as majority stockholder, but as underwriter or banker under the reorganization agreement. The essential facts are these: While dominating the old company through control of a majority of its stock, the Southern Pacific entered into its reorganization, under an agreement by which the minority stockholders of the old company could obtain stock in the new only upon payment in cash of a prohibitive assessment of $71.40 per share (said to be required to satisfy the floating debt and reorganization expenses and charges), while the Southern Pacific was enabled to acquire all the stock in the new company upon paying an assessment of $26 per share (said to be the amount required to satisfy reorganization expenses and charges.) The Southern Pacific asserts that, unlike the minority stockholders, it assumed an underwriter's obligation to take the new company's stock not subscribed for by the minority, and also guaranteed part of the principal and all of the interest on the new company's bonds, which were given in exchange for those of the old company. But the purpose of the Southern Pacific in assuming

these obligations was in no sense to perform the function of banker. It was to secure the incorporation of the Houston Railroad into its own transcontinental system. And it was never called upon to pay anything under its guaranty."

* * * * * * *

"Fifth. Equally unfounded is the contention that the Southern Pacific cannot be held liable because it was not guilty of fraud or mismanagement. The essential of the liability to account sought to be enforced in this suit lies not in fraud or mismanagement, but in the fact that, having become a fiduciary through taking control of the old Houston Company, the Southern Pacific has secured fruits which it has not shared with the minority. The wrong lay not in acquiring the stock, but in refusing to make a pro rata distribution on equal terms among the old Houston Company shareholders."

* * * * * * *

"Seventh. The Southern Pacific also contends that the decree is erroneous because the effect is to give the minority their pro rata share in the new Houston Company without their having made any contribution towards satisfying the floating indebtedness of the old; whereas, the floating-debt creditors had a claim against the property prior in interest to that of the old company's stockholders. Kansas City Southern R. Co. v. Guardian Trust Co., 240

U. S. 166, 60 L. ed. 579, 36 Sup. Ct. Rep. 334; Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. ed. 931, [918] 33 Sup. Ct. Rep. 554. The fact that no provision was made for the floating indebtedness is not a bar to the minority obtaining relief. They did not come into court with unclean hands because there were floating-debt creditors unpaid. If any floating-debt creditors have been illegally deprived of rights, it was not by the minority's acts."

* * * * * * *

"Eleventh. The certiorari and return were filed May 3, 1918. On October 8, 1918, separate petitions were filed in this court by Henry J. Chase, by Fergus Reid, by Albert M. Polack, by Francis P. O'Reilly, and by the Corn Exchange Bank, alleging that they were respectively owners of stock in the old Houston Company and praying leave to intervene and that they be permitted to share in the benefits of the decree, or in the alternative, that they be permitted to make such application to the district court. Action on these petitions was postponed to the hearing of the case on the merits. As the case must be remanded to the district court for further proceedings as above stated, we deny these several petitions without expressing any opinion on their merits and without prejudice to the right to apply to the district court for leave to intervene and share in the benefits of the decree."

The District Court in the same case (226 F. 500 at 512), which was affirmed, found and determined as follows:

> "It must be held that the defendant has, for the purposes of the present action, obtained the property free from any lien or claims of the general creditors. The plaintiffs did not have an opportunity to prevent the action of the majority stockholders, in thus acquiring the property of the railway company, and the Southern Pacific Company acquired this property subject to any equitable rights which the minority stockholders might have therein. Such cases as Ervin v. Oregon Ry. & Navigation Co. (C. C.) 27 Fed. 625; Farmers' Loan & Trust Co. v. N. Y. & N. R. Co., 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689; Sparrow v. Bement, 142 Mich. 441, 105 N. W. 881, 10 L. R. A. (N. S.) 725; Backus v. Brooks, 195 Fed. 452, 115 C. C. A. 354; Cook on Corp. Sec. 662, and cases cited; Synnott v. Cummings (C. C.) 116 Fed. 40—sufficiently establish the proposition that the minority stockholders had rights which they could enforce against the property in the hands of the majority stockholders. In enforcing these rights, they can insist upon an accounting and division of their property in equity, leaving the property, that is, the shares of stock in their hands, subject to any claims which are still valid and enforceable against the stockholders, either through the

Houston & Texas Central Railway Company itself, or against the stockholders directly."

All of the Northern Pacific Railroad Company's debts and obligations and all of its stock (Paragraph 6, pages 13 and 14 of this petition) except the non-assenting stockholders, and all of the reorganization expenses were paid and satisfied without the Syndicate Members having to put up a cent or having to make good or pay a cent on their guaranty and without any cost to the railway company (Paragraph 11 of this petition) sufficient stock of the railway company issued by it as part of its agreed purchase price, which could more than pay the non-assenting stockholders, including these petitioners and those associated with them, the $3,255,900 par value of their railroad stock and also their pro- [919] portion of all dividends declared on railway company stock since 1896, was returned to the railway company in 1897 in addition to the other stocks, bonds and securities, also part of said purchase price, that were similarly returned to the railway company as listed and set out in Paragraphs 8 and 14 of this petition.

These petitioners are advised and charge that the railway company, its officers and officials are holding all of the preferred and common stock of the railroad company now in its possession, ownership or control as trustees for the holders and owners of the securities and stocks of the railway company issued since July 1, 1896, whether issued as a

corporation, a de facto corporation, a partnership or other association and the said railway company, its officers and officials should be enjoined and restrained from in any manner selling, disposing of or transferring said preferred and common stock of the railroad company or any part thereof or a trustee should be appointed to take possession and control of same for the security and protection, of the holders of any and all securities and stocks issued by the said railway company since July 1, 1896, and of the public in order that there may be no break in the market of said securities and stocks of said railway company.

In the book entitled "Some Legal Phases of Corporate Financing, Re-Organization and Regulation," by Francis Lynde Stetson, James Byrne, Paul D. Cravath, George W. Wickersham, Gilbert H. Montague, George S. Coleman and William D. Guthrie, it is stated at page 212:

> "Except in a comparatively rare case of redeemable preferred stock, there is usually no way in a voluntary readjustment by which the status of stock can be changed without the consent of its holders, nevertheless it becomes necessary in such a case to continue the non-assenting stock without disturbing its status, except so far as may be permitted by the exercise of the powers expressly conferred by the corporation's charter or by the statute subject to which the corporation was reorganized."

This book also says that they hoped to be relieved from the terrors of the Boyd case but instead it was practically re-affirmed in Kansas City Southern Railroad Co. v. Guardian Trust Co., 240 U. S. 166; 60 L. ed. 579. [920]

In United States vs. N. O. P. Ry. Co., 248 U. S. 507; 63 L. ed. 388, the Court found and determined:

> "As the patents were issued before and the suits were brought more than five years after the act * * *, the prayer that the patents be cancelled must be put out of view and the alternative prayer that the title under the patent be declared to be held in trust for the homestead claimants and the trust enforced must be regarded as if standing alone."

And the trust was established and enforced. [921]

Wherefore, these petitioners on behalf of themselves and all other stockholders of the Northern Pacific Railroad Company similarly situated pray:

(A) That they may be permitted to file this petition, that process issue and that the plaintiff and the defendants be required to answer same, but not under oath, as answer under oath is expressly waived.

(B) That all the relief prayed for in Paragraphs (a) to (k) both inclusive, in the answer and cross bill filed by these petitioners on behalf of the railroad company in this suit on September 3, 1937 be granted.

(C) That the Court find, declare and decree that the 1896 so-called reorganization and fake fore-

closure be declared to have been illegal, unlawful, fraudulent and in fraud of the Court and in fraud of these petitioners and other stockholders likewise situated; that the United States Circuit Court for the Eastern District of Wisconsin was without jurisdiction and that all its orders and proceedings were absolutely null and void and were obtained by fraud on the Court.

(D) That the Court find, declare and decree that all of the preferred and common stock of the railroad company now in the ownership, possession or control of the railway company be declared a trust fund for the holders and owners of the securities and stocks issued by the railway company since July 1, 1896 and that the said railway company, its officers and officials be enjoined and restrained from in any manner selling, disposing of or transferring said preferred and common stock of the railroad company or any part thereof and that the said railway company, its officers and officials be mandatorily required to hold said preferred and common stock of the railroad company or to turn it over to a trustee to be appointed by this Court to be held as security for and protection of the holders and owners of securities and stocks of the said railway company issued since July 1, 1896.

[922]

(E) That in the event the Court should deny these petitioners the relief prayed for above and by reference prayed for in the answer and cross bill of these petitioners on behalf of the railroad

company in this suit, that then and in that event the Court find, declare and decree that the railway company, illegally, unlawfully and in fraud of these petitioners and other stockholders of the railroad company likewise situated, in 1896 held sufficient stock of the railway company isued by it as part of its agreed purchase price of the lands, properties and assets of the railroad company, to more than pay the non-assenting stockholders of the railroad company, including these petitioners and those associated with them, the $3,255,900 par value of their railroad company stock and also their proportion of all dividends declared on said railway company stock since 1896, and that said stock in justice and equity is the property of and belongs to these petitioners and other stockholders likewise situated, and that the Court issue a mandatory injunction requiring the railway company to deliver such stock and pay such dividends to these petitioners and other stockholders likewise situated, and a judgment be entered against the railway company for the par value of said stock plus the dividends declared on same since July 1, 1896 in favor of these petitioners and other stockholders likewise situated.

(F) That the Court find, declare and decree all other further and general relief to these petitioners and other stockholders of the railroad company likewise situated who may come in and share the costs of this petition, as their cause may require and to equity may seem just and proper, in-

cluding counsel fees and costs. And they will ever pray.

WALTER L. HAEHNLEN

.....

Charles E. Schmidt

.....

George Landell, Executor of
E. A. Landell

.....

Clarence Loebenthal, Trustee
of Bernard Loebenthal
By Counsel [923]

THOMAS BOYLAN
Liberty Trust Building
Philadelphia, Pennsylvania
ROBERT L. EDMISTON
Title Building
Spokane, Washington
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE
Peoples Life Ins. Bldg.
Washington, D. C.
Solicitors for Petitioners

State of Pennsylvania
County of Philadelphia—ss.

I, Walter L. Haehnlen, being first duly sworn, depose and state that I am one of the petitioners in

the foregoing petition, which I have read, and the facts stated therein are true to the best of my knowledge, information and belief.

WALTER L. HAEHNLEN

Subscribed and sworn to before me and given under my hand and seal this the 20th day of January, 1938. My commission expires the 8th day of April, 1941.

[Seal] CLAUDE E. FRENCH
Notary Public for County of Philadelphia, State of Pennsylvania
Notary Public.

My Commission expires April 8, 1941. [924]

INTERROGATORIES WHICH THE NORTHERN PACIFIC RAILROAD COMPANY AND NORTHERN PACIFIC RAILWAY COMPANY ARE REQUIRED TO ANSWER AND DOCUMENTS THEY ARE REQUIRED TO FILE AND SERVE A COPY OF ON PETITIONERS

These petitioners give notice to the Court that the information and the documents, papers and correspondence required in these interrogatories are material and relevant to this cause and to enable these petitioners to present and make out their cause of action, and the said information, documents, papers and correspondence are known by and are in the possession of the Northern Pacific

Railway Company and Northern Pacific Railroad Company.

1. State all of the dividends declared and/or paid since July 1, 1896 on the common and preferred stock of the Northern Pacific Railway Company, giving the date and the amount of each.

2. State how many of the 7.3% bonds of the Northern Pacific Railroad Company of July 1, 1870 were deposited with the Farmers Loan & Trust Company of New York in 1875 and 1876.

3. State whether or not the said bonds or any of them, and if so, how many, are still on deposit with the Farmers Loan & Trust Company of New York. If any have been withdrawn, by whom and for what purpose and where are they now ?

4. Was not a large block of the stock of the Northern Pacific Railroad Company deposited in 1870 or 1875 in the Central Trust Company?

5. If the answer to the foregoing question is in the affirmative, state how much stock was so deposited and whether all or any part is still there.

6. If any of the stock has been withdrawn, state when, by whom, for what purpose, the amount of same, and where the stock is now.

7. File and serve copies of all minutes of the meetings of the incorporators, stockholders and board of directors of the railroad company from July 2, 1864 to date.

8. File and serve copies of all minutes of the meetings of the incorporators, stockholders and board of directors of the railway company from date of incorporation to date. [925]

9. How many shares of common and preferred stock of the Northern Pacific Railroad Company is held or owned by the Northern Pacific Railway Company at this time and state when and from whom received, for what consideration and under what terms and conditions, and when transferred on the books of the railroad company to the railway company with the name of the transferrer.

10. File and serve a copy of the report of the Purchasing Committee of the railroad company in 1875 filed at the meeting of the board and stockholders on September 9, 1875.

11. File and serve a copy of the contract between the railroad company and the proprietors of the City of Superior, Wisconsin, by which they were to convey one-third of their interest in the city to the Northern Pacific Company in consideration of the extension of the main line eastward from Thompson's Junction as far as Superior within the year 1881.

12. File and serve a copy of the map filed by the railroad company in the General Land Office July 3, 1882.

13. File and serve a copy of the report of the railway company of June 30, 1898, showing as in its treasury 2600 Northern Pacific Railroad Company 7.3% bonds.

14. File and serve a copy of all the annual reports of the railroad company and of the railway company from the dates of their incorporation to this date.

15. What was the consideration for the assignment from the Farmers Loan and Trust Company of New York to the railway company on October 20, 1899, of two judgments in the Circuit Court of the United States for the District of Minnesota against the railroad company for $1,144,948.39 and $686,-552.99, dated the 4th day of May, 1896?

16. How and where were the said two judgments paid and satisfied, as they were released on November 29, 1899? [926]

17. File and serve a copy of the brief and of the answer of the railway company in the proceedings in the Interstate Commerce Commission entitled "City of Spokane vs. Northern Pacific Railway Company."

18. File and serve a copy of all maps of definite location filed by the railway company and by the railroad company.

19. File and serve copies of all maps of line of route filed by the railway company and by the railroad company.

20. Were there not two different kinds or characters of preferred stock issued by the railroad company during and after 1875?

21. If so, describe fully and in detail each kind and state how much of each kind was issued and all of those to whom each kind was issued.

22. Was not there an unauthorized issue of the consolidated bonds under the mortgage dated December 2, 1889?

23. If so, give the amounts and dates of such unauthorized bonds and to whom they were delivered.

24. Was not there an over-issue of consolidated bonds under the mortgage dated December 2, 1889?

25. If so, give the amounts and date of such over-issue of consolidated bonds and to whom they were delivered.

THOMAS BOYLAN
Liberty Trust Building
Philadelphia, Pennsylvania
ROBERT L. EDMISTON
Title Building
Spokane, Washington
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE JR.
Peoples Life Insurance Bldg.
Washington, D. C.
Solicitors for Petitioners

[Endorsed]: Filed Jan. 31, 1938. [927]

[Title of District Court and Cause.]

APPEARANCE

To the Clerk of the above entitled Court:

You will please enter the appearance of the undersigned attorneys or solicitors for the defendant Northern Pacific Railroad Company, which defendant hereby also enters its appearance in the

above entitled case, covering its answer filed therein September 3, 1937, together with all other interests of said defendant involved in said case, reserving all rights, and subject to court rules and procedure.

Dated this 14th day of February, 1938.

NORTHERN PACIFIC RAILROAD CO.
By THOMAS BOYLAN
Liberty Trust Building
Philadelphia, Pennsylvania
ROBERT L. EDMISTON
Title Building
Spokane, Washington
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE JR. E
People's Life Insurance Bldg.
Washington, D. C.

[Endorsed]: Filed Feb. 14, 1938. [928]

[Title of District Court and Cause.]

APPEARANCE

To the Clerk of the above entitled Court:

You will please enter the appearance of the above named intervenors in the above entitled action by their undersigned attorneys or solicitors, covering their intervention petition filed in said case January 31st, 1938, together with all interests of said intervenors involved in the above entitled action, waiving no rights, and subject to court rules and procedure.

Dated this 14th day of February, 1938.

CHARLES E. SCHMIDT
and other stockholders of the
N. P. Railroad Co.
By THOMAS BOYLAN E
Liberty Trust Building
Philadelphia, Pennsylvania
ROBERT L. EDMISTON
Title Building
Spokane, Washington
RAYMOND M. HUDSON E
MINOR HUDSON E
GEOFFREY CREYKE JR. E
People's Life Insurance Bldg.
Washington, D. C.

[Endorsed]: Filed Feb. 14, 1938. [929]

[Title of District Court and Cause.]

MOTION OF THE NORTHERN PACIFIC RAILROAD COMPANY BY CHARLES E. SCHMIDT AND OTHERS, MINORITY STOCKHOLDERS, AND OF SAID CHARLES E. SCHMIDT AND OTHERS, MINORITY STOCKHOLDERS, PETITIONERS, TO CONSTRUE, MODIFY AND/OR AMEND THE REPORT OF SPECIAL MASTER GRAVES FILED JULY 26, 1937

1. Now comes the Northern Pacific Railroad Company by Charles E. Schmidt and others, minor-

ity stockholders who have heretofore filed an answer on behalf of the said railroad herein and also now come the said Charles E. Schmidt and others, minority stockholders of the said railroad company who filed an intervening petition herein, and move the Court to construe, modify and/or amend the report of Special Master F. H. Graves filed in this cause on July 26, 1937, so as to make the report state and read that wherever in the report the words "the company" or the words "the railway company" or the words "Northern Pacific Railway Company" or the words "railroad," "Northern Pacific" or "defendant" are used, that they and each of them shall be intended to mean and shall mean the Northern Pacific Railroad Company created under the Act of Congress of July 2, 1864 or the so-called Northern Pacific Railway Company, the Wisconsin corporation, whichever the Court on final decree shall hold and determine is the owner, and entitled to possession, of the land, land grants, rights to land, property and all other assets involved in and covered by the said report.

2. Or in the alternative, if the Court is of the opinion that it has not the power to construe, modify and/or amend the [930] said report, that then the Court require Special Master Graves to construe, modify and/or amend the said report as set out in Paragraph 1 of this motion.

3. (a) The words "the company" occur on pages 11, 30, 36, 37, 38, 41, 64, 66, 67, 68, 70, 72, 73, 75, 88, 90, 91, 93, 95, 98, 102, 105, 108, 110, 112, 115,

116, 119, 138, 146, 147, 150, 151, 152 and other pages.

(b) The words "the railway company" appear on pages 13, 18, 23, 24, 67, 68, 69, 88, 101, 112, 116, 117, 122, 137, 139, 150 in (d), 153, 155 and other pages.

(c) The words "The Northern Pacific Railway Company" occur on pages 150 in (c) and 153 and other pages.

(d) The words "railroad", "N. P.", "Northern Pacific" or "defendant" occur on pages 25, 29, 40, 41, 46, 55, 58, 64, 86, 119, 144, 145, 146, 149, 152, 153, 154 and other pages.

Respectfully submitted

THOMAS BOYLAN
Liberty Trust Building
Philadelphia, Pa.

ROBERT L. EDMISTON
Title Building
Spokane, Washington

RAYMOND M. HUDSON
MINOR HUDSON H
GEOFFREY CREYKE JR. H
People's Life Insurance Bldg.
Washington, D. C.

Attorneys for Petitioners and Northern Pacific Railroad Co.

Copy received Feb. 19, 1938.

SAM M. DRIVES
E.G.F.
F. J. McKEVITT [931]

[Title of District Court and Cause.]

EXCEPTIONS OF NORTHERN PACIFIC RAILROAD COMPANY BY CHARLES E. SCHMIDT AND OTHERS, MINORITY STOCKHOLDERS, AND OF SAID CHARLES E. SCHMIDT AND OTHERS, MINORITY STOCKHOLDERS, PETITIONERS, TO THE REPORT OF SPECIAL MASTER GRAVES FILED JULY 26, 1937.

1. Now comes the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and said Charles E. Schmidt and others, minority stockholders, petitioners, and except to the said report filed by Special Master Graves herein on July 26, 1937 and make and adopt each and all of the exceptions to said report heretofore filed in this cause on behalf of the Northern Pacific Railway Company and Northern Pacific Railroad Company, and the same are hereby referred to and made a part hereof by reference without setting them out verbatim herein. Each and all of the said exceptions should be granted.

2. The said report of Special Master Graves filed July 26, 1937, is further excepted to because Special Master Graves arbitrarily and without authority in effect reported, though rather indefinitely, as to points on disputes between the Northern Pacific Railroad Company and the Northern Pacific Railway Company raised in the Answer and cross bill of the railroad company heretofore

filed and the intervening petition of Charles E. Schmidt and others heretofore presented to the Court, which act and report of the said Special Master was without hearing or testimony directed thereto; the indefiniteness and the confusion of the report on these disputes, especially as to stating [932] in some places lands were the property of the railroad company, other of the railway company and other of the company, indicate that the Special Master so reported through inadvertence and this exception should be sustained.

Respectfully submitted,

THOMAS BOYLAN
Liberty Trust Building
Philadelphia, Pennsylvania
ROBERT L. EDMISTON
Title Building
Spokane, Washington
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE JR. H
Peoples Life Insurance Bldg.
Washington, D. C.
Attorneys for Petitioners and
Northern Pacific Railroad Co.

[933]

In the District Court of the United States for the Eastern District of Washington, Northern Division

In Equity No. E-4389

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, as reorganized in 1875,
NORTHWESTERN IMPROVEMENT COMPANY, a corporation,
BANKERS TRUST COMPANY, a corporation,
GUARANTY TRUST COMPANY, a corporation,
CITY BANK FARMERS TRUST COMPANY, a corporation,
Defendants.

ORDER DENYING LEAVE TO INTERVENE AND STRIKING ANSWER AND CROSS-BILL

On this day the motions of plaintiff and defendants Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company, to strike from the files the

document entitled, "Answer and Cross Bill of the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders of said Railroad Company", and the motion of said parties for leave to file and serve said document, having been heard, it is ordered that the motion of the plaintiff and of said defendants to strike said above described document from the files, be, and the same is hereby, granted, and the said motion for leave to file and serve said document be and the same is hereby denied.

The motion of Walter L. Haehnlen and others for leave to file intervening petition attached to said motion, have come on to be heard, it is ordered that the said motion be, and the [934] same is, hereby denied, and said petition of Charles E. Schmidt and other stockholders of the Northern Pacific Railroad Company to intervene on their own behalf and on behalf of all other stockholders similarly situated, be, and the same is hereby, stricken from this cause.

"Motion of the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and of said Charles E. Schmidt and others, minority stockholders, petitioners, to construe, modify and/or amend the report of the Special Master Graves filed July 26, 1937", coming on to be heard, it is ordered that said motion be, and the same is hereby, denied.

That certain document entitled, "Joinder of the Northern Pacific Railroad Company by Charles E.

Schmidt and others, minority stockholders, and of said Charles E. Schmidt and others, minority stockholders, petitioners, in the two motions filed to re-refer the report to the Special Master", and that certain document entitled, "Exceptions of Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and of said Charles E. Schmidt and others, minority stockholders, petitioners, to the report of Special Master Graves filed July 26, 1937", having come on to be heard, it is ordered that the same be, and they are hereby, stricken from the files in this cause.

"Motion on behalf of the said Northern Pacific Railroad Company for an extension of time to file exceptions to the Special Master's Report filed July 26th, 1937", having come on to be heard, it is ordered that the same be, and it is hereby, stricken from the files in this cause.

It is further ordered, that this order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves, to assert [935] in any other proceeding any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition.

Exception is allowed the Petitioners in intervention to all of the rulings above.

Dated at Spokane, Washington, March 9, 1938.

J. STANLEY WEBSTER
District Judge

[Endorsed]: Filed March 9, 1938. [936]

[Title of District Court and Cause.]

PETITION AND MOTION OF THE NORTHERN PACIFIC RAILROAD COMPANY, BY CHARLES E. SCHMIDT AND OTHER MINORITY STOCKHOLDERS:

1. To review, revise and amend Decree or Order entered in this cause March 9th, 1938.

2. And to Amend at bar its cross-bill and Answer by making a part of the said cross-bill and Answer, the Intervening Petition of Charles E. Schmidt and others, filed January 31, 1938, in this cause, and thereby making all the allegations to the said intervening Petition additional allegations in and to the said Answer and Cross-Bill.

1st. Now come the Northern Pacific Railroad Company by Charles E. Schmidt, George Landell, Executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal and Walter

L. Haehnlen, and moves the court to review, revise and amend the Decree or Order entered herein on March 9th, 1938, and for reasons therefor, adopt and make part hereof the Petition and Motion of Charles E. Schmidt and other intervening Petitioners to review, revise and amend this day filed in this cause, the same as if set out verbatim herein. [937]

2nd. Now comes The Northern Pacific Railroad Company by Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal, and Walter L. Haehnlen, and petitions and moves the court to permit it to amend at bar, its cross-bill filed in this cause on September 3rd, 1937, by adopting and making a part thereof the Intervening Petition and all the allegations therein filed in this cause January 31st, 1938, by Charles E. Schmidt and other minority stockholders of the Northern Pacific Railroad Company, without having to rewrite the cross-bill and Intervening Petition, and refile same, but to simply make the amendment by reference thereto; that a proper decree be entered allowing the amendment at bar by such reference.

ROBERT L. EDMISTON,
THOMAS BOYLAN,
RAYMOND M. HUDSON,

Attorneys for Charles E. Schmidt and other Minority Stockholders of the Northern Pacific Railroad Co., Intervening Petitioners.

State of Washington,
County of Spokane—ss.

I, Thomas Boylan, being first duly sworn depose and state that I am one of counsel for the Petitioners in the above Petition and Motion, and I have read the said Petition and Motion, and the facts stated therein are true to the best of my knowledge, information and belief.

THOMAS BOYLAN.

Subscribed and sworn to before me this 10th day of March, 1938.

[Seal] JOHN H. ROCHE,
Notary Public in and for the State of Washington, residing at Spokane, Wash.

[Endorsed]: Filed March 11, 1938. [938]

[Title of District Court and Cause.]

PETITION AND MOTION OF CHARLES E. SCHMIDT AND OTHER MINORITY STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD CO., INTERVENING PETITIONERS TO REVIEW, REVISE AND AMEND DECREE OR ORDER ENTERED IN THIS CAUSE ON MARCH 9, 1938.

Now comes Charles E. Schmidt, George Landell, Executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal, and Walter

L. Haehnlen, intervening petitioners, on behalf of themselves and all other minority stockholders of the Northern Pacific Railroad Company, and petition and move the court to review, revise and amend the Decree or Order entered in this cause on March 9th, 1938, for reasons hereinafter set forth.

On July 26th, 1937, these petitioners had not become parties to the cause, nor had they filed any pleadings on behalf of the Northern Pacific Railroad Company, and were not given Notice of, or served with, a copy of the Report of Special Master F. H. Graves, filed July 26, 1937, but learning of same they did, on August 25th, 1937, file a Motion on behalf of the Northern Pacific Railroad Company to extend the time to file exceptions to the Special Master's Report of July 26th, 1937; no objection to, or Motion to strike this Motion, was filed by anyone, and before the Motion was heard the exceptions [939] were filed and the Motion having kept the time open, the Motion, under the rules and practice should have been granted.

On September 3, 1937, the Northern Pacific Railroad Company, by Charles E. Schmidt and other minority stockholders of said Railroad Company filed its answer and cross-bill, and the plaintiff on September 13, 1937, and the Northern Pacific Railway Company, the Northern Pacific Railroad Company, through the attorneys of the Northern Pacific Railway Company, and the Northwestern Improvement Company, filed respective motions to strike the said Answer and Cross-bill, but no Motion to dis-

miss the Answer and cross-bill has at any time been filed.

That these Intervening Petitioners on behalf of themselves and all other minority stockholders of the Railroad Company filed a Petition to Intervene in this cause on January 31, 1938, with a Motion for leave to Intervene, and served the Notice thereon, to which no objections or motions to strike have been filed.

On February 19th, 1938, the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders filed a Motion to construe, modify and/or amend the Report of the Special Master, which was to review questions of law arising on the face of the Report, to which no objections or motions to strike were filed. That on February 19th, 1938, the Northern Pacific Railroad Company, by Charles E. Schmidt and other minority stockholders, and Charles E. Schmidt and other minority stockholders as intervening petitioners, filed a joinder in two motions theretofore filed by the Railway Company to re-refer the Report to the Special Master to which joinder no objections or motions to strike were filed. That on February 19th, 1938, the Northern Pacific Railroad Company, by Charles E. Schmidt and other minority stockholders filed exceptions to the Report of Special Master F. H. Graves, filed July 26th, 1937, and Charles E. Schmidt and other minority stockholders, intervening petitioners, joined in said exceptions, and on [940] March 7th, 1938, the plaintiff filed a

Motion to Strike the exceptions but no other objections or motions to strike the exceptions were filed.

The exceptions were to review the report on questions of law arising on the face of the report.

In the latter part of February 1938, the Clerk of the Court sent to counsel in the cause, a notice stating,

> "Take Notice that the above-entitled case has been set for hearing in said court at Spokane, on March 7th, 1938, at 10 A. M. on exceptions to Master's Report, and Motion for leave to file intervening petition."

On March 7th, 1938, the court first heard arguments on the Answer and Cross-bill of the Northern Pacific Railroad Company filed by Charles E. Schmidt and others, and on the intervening Petition, and announced that the court would strike the said Answer and Cross-bill and the Motion for leave to file the intervening Petition, and then the Court stated that his decision would be without prejudice to any of the minority stockholders of the Northern Pacific Railroad Company to assert in this cause, or any other cause, any rights that they may have by reason of the matters and things alleged in the Answer and Cross-Bill of the Railroad Company, and the said Intervening Petition, and the court further stated, that he would put in the Decree that when the Court hereafter determines the amount of money, if any, that the United States is required to pay in this suit, a provision that the fund or amount

so found by the court, is due by the United States, shall not be paid by the United States to anyone until the court has determined whether or not the lands and property which the said funds represent, are the lands and properties of, and therefore the funds should be paid to, the Northern Pacific Railroad Company or the Northern Pacific Railway Company, and that the Northern Pacific Railroad Company, by Charles E. Schmidt and other minority stockholders, and the intervening petitioners, Charles E. Schmidt and all other minority stockholders of the Northern Pacific Railroad Company shall have been given an opportunity to present their contention and claims to the said property and money on behalf of the said Northern Pacific Railroad Company, and on behalf of the [941] Intervening Petitioners, and until a similar opportunity is given the Northern Pacific Railway Company. The court indicated that they would go in the Decree determining the amount due by the United States, if any, and counsel stated that they understood the court to have said that there be such provision in the decree on these motions, and counsel for the Railway Company stated it was agreeable to him for it to go into the Decree that was to be entered on the hearing on March 7th, 1938, and there was no objection by the Attorney for the Plaintiff, and the court stated it would be put in the Decree to be entered at this time, and counsel representing the Northern Pacific Railroad Company in the Answer and Cross-Bill, and represent-

ing the Intervening Petitioners accordingly drafted a form of Decree in accordance with the court's decision and statement and presented same. That attorneys for the Railway Company presented a Decree, to which the attorneys for the plaintiff agreed, leaving out the paragraph that there would be a determination by the Court as to the true and actual ownership of the lands and properties, and the money, which was to be paid to represent same.

Immediately after the conclusion of the argument on said motions on March 7th, 1938, the hearings were continued on various exceptions of various parties, and during the argument the following occurred as described in The Spokesman-Review of March 9th, 1938, thus:

> "Surprising observers who had not anticipated any immediate decisions in the government land grant case now being argued by federal and Northern Pacific counsel before Judge J. Stanley Webster in federal court, the judge yesterday afternoon overruled the special master and sustained the government in its first exception to the master's ruling.
>
> By his decision, Judge Webster returned to the government title to 315,000 acres of land in the Crow Indian reservation the master had given the railroad. He held with the government's contention that inasmuch as this land had been primarily excluded because it was Indian land and the railroad given land elsewhere in lieu of it, the railroad had no right to

later file upon it because the government bought it from the Indians.

Cite Court Decision

This point was argued for the government by Judge C. Crawford Biggs, former solicitor general of the United States. Yesterday morning Judge Webster halted him in the midst of his argument and called upon L. B. daPonte, chief counsel for the Northern Pacific, to argue for the railroad. Judge Biggs had cited three or four supreme court decisions in keeping with his argument. [942]

Mr. daPonte cited Judge Vandervanter, later United States Supreme court judge and an admitted land authority; Attorney General Wickersham, and several acts of the land department as authorities for the railroad's contention it was entitled to file upon the lands again when the government bought them from the Indians.

His Terms Terse.

Judge Webster then surprised his listeners by giving his decision immediately in a formal report and not at the conclusion of the arguments and taking the case under advisement.

In no uncertain terms he declared he did not care what Judge Vandervanter, Attorney Wickersham, or the land department had done, he was bound by the acts of the Supreme Court and the matter was clearly one of equity that was stated plainly in the original terms of the grant.

The grant itself specifically barred the railroad from filing on the Indian lands in question and the railroad was reimbursed with land elsewhere for that reason. Just because the government later decided to buy back these lands from the Indians and make them part of the public domain did not give the railroad the right to violate the terms of the grant and file upon them, he ruled.

Means $1,000,000 Loss

The railroad probably would not have filed upon these lands had there been rich lands elsewhere to satisfy their claims. But it delayed so long in filing upon all the lands entitled to it under the grant that good lands were not available in sufficient quantities to satisfy the grant so the company grabbed everything available, the records show."

The foregoing sustained the Twelfth exception of the plaintiff to the report of Special Master Graves, filed July 26, 1937, which ruling was not only erroneous but was injurious and prejudicial to the rights of the Intervening Petitioners and the Northern Pacific Railroad Company, and accordingly in the form of Decree drafted and submitted by Petitioners, there is a paragraph as follows:

"It is further ordered that the twelfth exception filed by the plaintiff to the Special Master's Report filed July 26th, 1937, be and

the same is hereby sustained and the Special Master's said report is to that extent modified."

The Court refused to sign the draft presented by Petitioners and refused to insert said paragraph in the Decree signed by the court.

Thereupon the Decree presented by the Railway Company and concurred in by the plaintiff, was entered on March 9th. [943]

The plaintiff filed by Stipulation, some amendments to the Bill on the 4th day of June 1931, and the cause was referred to Special Master Graves on May 24th, 1932, to Report on the pleas, Motions to Dismiss and other pleadings, and the Special Master filed his report on May 31st, 1933, to which exceptions were filed by both plaintiff and defendants, and no one knew, or could know, until after the Court settled the pleadings under the Report by the Decree of October 3, 1935, as amended by the Decree of January 29, 1936, whether or not the Attorney General would obey the mandate of Congress and put in issue the validity and legal sufficiency of the mortgages and foreclosure, and seek the settlement of the other disputes raised before the Joint Congressional Committee, and perform all the other duties required of him by the Act of June 25th, 1929, and the Acts therein referred to; the Attorney General did not comply with the mandate of Congress requiring him to prosecute and have determined the validity and

legal effect of the mortgages, foreclosures and ownership of the Railroad System, lands and property.

That the court can, and did once in this cause, properly and clearly preserve and reserve rights of litigants as shown by paragraphs 1 and 2 of Decree of January 29th, 1936, which are as follows:

> "1. All the exceptions of plaintiff and of defendants be and they hereby are overruled, except that there are reserved until the final hearing all questions with respect to the defenses of innocent purchasers for value interposed by the defendants Bankers Trust Company, as trustee, and City Bank Farmers Trust Company, as Trustee. [944]
>
> 2. The report of said Special Master be and hereby is adopted in its entirety, except for the matters reserved as just provided."

The Decree or Order of March 9th, 1937, should be reviewed, revised and amended:

1. The Court under misapprehension stated during argument that the Court and the Master had determined the validity of the mortgages. The Special Master in his First Report, which was confirmed by the Court stated on page 196, "The government neither by the Bill nor in argument is attempting to set aside the decrees of foreclosure or the sales had under those decrees."

There was no issue in the cause as to the validity of the mortgages or the foreclosure until the An-

swer of the Northern Pacific Railroad Company, by Charles E. Schmidt, filed September 3, 1937.

2. The Attorney General was not only derelict and violated the mandate [945] of Congress by failing to file and then prosecute a suit determining the validity of the mortgages and the title of the Railroad lands and property, but he has also now joined with and assisted, aided and abetted the Railway Company in preventing anyone else from having those questions and all other questions, raised in the Answer and Cross-bill and the Intervening Petition, determined by a court.

3. Motions to strike only go to the form of the pleading and not to the merits and the court cannot strike pleading on its own motion under the well established rules of pleading.

4. The contention that decision of the Answer and Cross-bill and the Intervening Petition would put too much work on this court, and the court did not know who would pay the cost, is utterly without merit as it is solely the function of Congress to determine how much work any court shall be required to do, and who shall pay the cost, and the court has no authority in the matter.

5. The clause beginning with the word "and" in the sixth line of the Decree of March 9th, 1938, is improper and erroneous and should be stricken out as the Motion mentioned had been abandoned by the Railroad Company by Charles E. Schmidt and counsel notified thereof, and the Motion was

not called up. The record shows that the Answer and Cross-bill was already filed and served, and it is well established by the decisions of the Federal Courts that a cross-bill can be filed without leave at any time before Final Decree, and the Motions of the parties to strike the cross-bill and answer estops them to contend that it was not filed.

6. The Decree violates the Cardinal Rule in not making the Decree clearly set forth what the court stated was its decision. The court stated that there would be a provision protecting the rights of the Northern Pacific Railroad Company, and of these intervening petitioners, and affording them an opportunity to be heard before the fund is distributed, whereas the decree fails to make any mention thereof; [946] The without prejudice clause that is inserted would be res adjudicata as to such a hearing in this court, as it uses the words, "in any other proceeding". When a suit is filed in equity, and in this case there is a cross-bill filed, and the defense is made that there is another remedy available, and the court sustains that defense without prejudice to the other proceeding, the rule is established by a long line of decisions that the decree become res adjudicata and the plaintiff could never come back into that court, or into equity in any court.

There is no reason or occasion why the court did not and cannot now make the decree clear and unequivocal on this point and fully preserve and pro-

tect the rights of the Northern Pacific Railroad Company and the Intervening Petitioners.

7. For the foregoing, and other reasons apparent on the face of the record the Decree or Order of March 9th, 1938, should be reviewed, revised and amended, and a Decree entered overruling all motions to strike, requiring Answers to the Cross-bill and Interrogatories, and permitting the filing of the Intervening Petition, the sustaining of the exceptions of the Northern Pacific Railroad Company, and the Intervening Petitioners, and granting their Motion to review, revise and modify the Report of Special Master Graves filed July 26, 1937, and granting the joinder of the Railroad Company and these Petitioners.

But, if the court refuses to do this, then the court should strike out the last clause of the first paragraph of the Decree or Order of March 9th, 1938, should clarify the last paragraph, so as to affirmatively grant and decree the Northern Pacific Railroad Company and the Intervening Petitioners an opportunity to present and have the proper determination of their rights and contentions set out in the cross-bill and intervening Petition at a later date in this court, after the court has established a fund.

The Decree is confusing and contradictory and does not preserve the rights of the Railroad Company and the intervening petitioners, as the court stated in its decision would be preserved. [947]

If the court should unfortunately pass away or resign, or move to the Circuit Court of Appeals before the fund is established, there would be nothing in the record requiring his successor to grant the Railroad Company and these intervening petitioners such a hearing and determination.

Wherefore these intervening petitioners pray that the foregoing petition and motion be granted, and they will ever pray.

ROBERT L. EDMISTON,
THOMAS BOYLAN,
RAYMOND M. HUDSON,

Attorneys for Charles E. Schmidt, and other Minority Stockholders of the Northern Pacific Railroad Co., Intervening Petitioners.

State of Washington,
County of Spokane—ss.

I, Thomas Boylan, being first duly sworn depose and state that I am one of counsel for the Petitioners in the above Petition and Motion, and I have read the said Petition and Motion, and the facts stated therein are true to the best of my knowledge, information and belief.

THOMAS BOYLAN.

Subscribed and sworn to before me this 10th day of March, 1938.

[Seal] JOHN H. ROCHE,

Notary Public in and for the State of Washington, residing at Spokane, Wash.

Copy rec'd Mch. 11—38.

F. J. McKEVITT,
Atty. for Trust Companies.

Copy received.

J. CRAWFORD BIGGS,
Atty. for Plf.

March 11, 1938.

[Endorsed]: Filed March 11, 1938. [948]

[Title of District and Cause.]

NOTICE.

To: L. B. daPonte, esq., Attorney for defendants and J. C. Biggs, esq., Attorney for Plaintiff.

Take Notice that we will call up Annexed Petition and Motion to rehear, before Judge Webster at 10:00 o'clock A. M., Monday, March 14th, 1938.

Dated this 11th day of March, 1938.

ROBERT L. EDMISTON,
RAYMOND M. HUDSON,

Of Attorneys for Charles E. Schmidt, and other Minority Stockholders of the Northern Pacific Railroad Co., Intervening Petitioners. [949]

[Title of District and Cause.]

MOTION OF NORTHERN PACIFIC RAILROAD COMPANY BY CHARLES E. SCHMIDT AND OTHERS, TO DISMISS THE ORIGINAL AND AMENDED BILL OF COMPLAINT HERETOFORE FILED IN THIS CAUSE.

Now comes the Northern Pacific Railroad Company by Charles E. Schmidt and others, and moves the court to dismiss the Original and Amended Bill of Complaint heretofore filed in this cause, for the following reasons:

1st. Because the Attorney General, in filing this cause in the name of the United States, failed to comply with, and violated the Mandate of Congress, as set out in the Act of June 25th, 1929.

2nd. Because the said Bill and Amended Bill of Complaint failed to put in issue, as required by said Act, whether or not the Northern Pacific Railroad Company, under the grants, could put more than one mortgage on the granted lands and properties.

3rd. Because the said Bill and Amended Bill of Complaint do not put in issue, as required by the said Act, the validity and legal effect of the foreclosures of any and all mortgages which the Northern Pacific Railroad Company claims to have placed on the granted land. [950]

4th. Because the said Bill and Amended Bill of Complaint, failed to put in issue as required by the last clause of section five (5) of said Act,

"and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment."

5th. For other grounds and reasons apparent on the face of the Bill and Amended Bil of Complaint.

Dated this 16th day of March, 1938.

ROBERT L. EDMISTON
THOMAS BOYLAN H
RAYMOND M. HUDSON
Attorneys for Charles E. Schmidt and other Minority Stockholders of the Northern Pacific Railroad Company, Intervening Petitioners.

Copy rec'd March 16, 1938.

J. C. BIGGS
Spec. Asst. to Atty. Gen'l
L. B. da Ponte

[Endorsed]: Filed March 17, 1938. [951]

In the District Court of the United States for the Eastern District of Washington, Northern Division

In Equity No. E-4389

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, as reorganized in 1875,
NORTHWESTERN IMPROVEMENT COMPANY, a corporation,
BANKERS TRUST COMPANY, a corporation,
GUARANTY TRUST COMPANY, a corporation,
CITY BANK FARMERS TRUST COMPANY, a corporation,

Defendants.

ORDER

The motion entitled, "Motion of Northern Pacific Railroad Company by Charles E. Schmidt and others, to dismiss the original and amended bill of complaint heretofore filed in this cause", and the petition and motion, entitled, "Petition and motion of the Northern Pacific Railroad Company, by Charles E. Schmidt and others minority stockholders: 1. To review, revise and amend Decree or Order entered in this case March 9th, 1938. 2. And

to Amend at bar its cross-bill and Answer by making a part of the said Cross-bill and Answer, the Intervening Petition of Charles E. Schmidt and others, filed January 31, 1938, in this cause, and thereby making all the allegations to the said intervening Petition additional allegations in and to the said Answer and Cross-bill", and the petition and motion, entitled, "Petition and Motion of Charles E. Schmidt and other minority stockholders of the Northern Pacific Railroad Co., intervening petitioners to review, revise and amend decree or order entered in this cause [952] on March 9, 1938", having come on to be heard on March 17, 1938, and having been considered,

It is ordered that said motions and petitions and each of them be, and the same are hereby, denied, and said moving parties, and each of them, are hereby allowed an exception to the denial of each of said motions and petitions.

It is further ordered, that this Order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves to assert later in this cause, when the fund, if any, to be distributed by the United States, is established and fixed or in any other proceeding, any rights which they may have by reason of the matters and things

alleged in said answer and cross-bill and in said intervening petition.

Dated March 22, 1938.

J. STANLEY WEBSTER
District Judge

[Endorsed]: Filed March 22, 1938. [953]

In the District Court of the United States for the Eastern District of Washington, Northern Division

Equity 4389

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, as reorganized in 1875,
NORTHWESTERN IMPROVEMENT COMPANY, a corporation,
BANKERS TRUST COMPANY, a corporation,
GUARANTY TRUST COMPANY, a corporation,
CITY BANK FARMERS TRUST COMPANY, a corporation,
Defendants.

ORDER ON EXCEPTIONS TO MASTER'S REPORT

This cause came on to be further heard upon the Special Master's report filed therein the 26th day

of July, 1937, and the Exceptions filed thereto, and after hearing argument, it was ordered:

(1) That plaintiff's exception numbered XII (relating to the Absaroka and Bear Tooth Forests) be and the same is hereby sustained. To such ruling the defendants except, and their exceptions are allowed.

(2) That plaintiff's exceptions numbered XVI to XXVII, inclusive XXXVIII and XXXIX (relating to substitution of Base) be and the same are hereby sustained. To such ruling the defendants except, and their exceptions are allowed.

(3) That plaintiff's exceptions numbered XL, XLIV, XLVIII, and XLIX (relating to Availability of Withdrawn Lands for Indemnity Selections) be and the same are hereby sustained. To such ruling the defendants except, and their exceptions are allowed.

(4) That plaintiff's exceptions numbered LV and LVI (relating to 1641.27 acres in former Fort Ellis Military Reservation) be and the same are hereby sustained. To such ruling the defendants except, and their exceptions are allowed. [954]

(5) That plaintiff's exception numbered XLIII (relating to Availability of Withdrawn Lands) be and the same is hereby sustained, except that subdivisions (e), (f), and (g) and all of subdivision (h) thereof, with the exception of the items of 1600 acres and 2217 acres, are hereby overruled. Insofar as by said rulings the exception is sustained defendants except and their exceptions are

allowed, and insofar as by said rulings the exception is overruled, plaintiff excepts and its exceptions are allowed.

(6) That plaintiff's exceptions numbered I, II, IV and V, and subdivision (a) of exception numbered III (relating to Portage conflict) be and the same are hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

Pending disposition of the amended motion to re-refer, ruling on subdivisions (b), (c) and (d) of exception numbered III is reserved.

(7) That plaintiff's exception numbered VI (relating to Quantity of Deficiency) be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(8) That plaintiff's exceptions numbered VII to XI inclusive (relating to Agricultural Lands) be and the same are hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(9) That plaintiff's exceptions numbered XIII to XV inclusive (relating to Northern Cheyenne Indian Reservation) be and the same are hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(10) That plaintiff's exception numbered XLI be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(11) That plaintiff's exception numbered XLII be and the same is hereby overruled. To such ruling

the plaintiff excepts, and its exceptions are allowed.

(12) That plaintiff's exception numbered XLV be and the same is [955] hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(13) The plaintiff's exceptions numbered XLVI be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(14) That plaintiff's exception numbered XLVII be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(15) That plaintiff's exception numbered L be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(16) That plaintiff's exception numbered LII be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(17) That plaintiff's exception numbered LIV (relating to Lands Patented to Homesteaders after withdrawal) be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(18) That plaintiff's exception numbered LVII (relating to Authorization of Second Indemnity Limits) be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(19) That plaintiff's exception numbered LVIII be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(20) The exceptions of the plaintiff numbered LI and LIII having been withdrawn by the plaintiff, it is unnecessary to consider them.

(21) The exceptions of the plaintiff numbered XXVIII to XXXVII inclusive, remain undisposed of because, in view of the other rulings upon exceptions of the plaintiff relating to substitution of base, it is unnecessary to consider them.

(22) That defendants' exception numbered I be and the same is hereby overruled. To such ruling the defendants except, and their [956] exceptions are allowed.

(23) That defendants' exception numbered II be and the same is hereby overruled. To such ruling the defendants except, and their exceptions are allowed.

(24) That defendants' exception numbered III be and the same is hereby overruled. To such ruling the defendants except, and their exceptions are allowed.

(25) That defendants' exception numbered IV be and the same is hereby overruled. To such ruling the defendants except, and their exceptions are allowed.

(26) That defendants' supplemental exceptions numbered I be and the same is hereby sustained.

(27) That defendants' supplemental exception numbered II be and the same is hereby sustained.

It further appearing to the court that there are additional matters connected with such report of the Master, which are yet to be considered and

determined by the Court before the review of said report may be completed, and that for the purpose of completing the review of said report of the Master and in order to enter an order or decree of this Court upon such review as required by the Act of June 25, 1929, and from which order or decree an appeal is authorized by the Act of May 22, 1936, it is necessary that the Court make such Findings of Fact and Conclusions of Law as the Court's review of said Master's report may require;

It is ordered that the parties hereto submit to the Court their proposed Findings of Fact and Conclusions of Law, together with their suggested draft or drafts of such order or decree.

Dated this 22nd day of March, 1938.

J. STANLEY WEBSTER
District Judge

Approved as to form:

J. CRAWFORD BIGGS
E. E. DANLY
WALTER L. POPE
Solicitors for Plaintiff

L. B. daPONTE
D. R. FROST
F. J. McKEVITT
Solicitors for Defendants

[Endorsed]: Filed March 22, 1938. [957]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR OF THE NORTHERN PACIFIC RAILROAD COMPANY BY CHARLES E. SCHMIDT AND OTHER MINORITY STOCKHOLDERS

Now comes the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders and makes, presents and files the following Assignments of Error on appeal.

I.

The Court erred in the Decree of May 24, 1932, by referring this cause on a Motion of the Railway Company and others (to which Motion the Railroad Company was not a party, though the Decree by mistake states it was on the Motion of the Northern Pacific Railroad Company) to the Special Master on the pleas, motions to dismiss and other pleadings as such reference was in violation of equity rule 59 as construed by In re Parker 283 Fed. 404 at 408, (4) III. (CCA-7), which reversed and cancelled such a reference; In re King 179 Fed. 694 (CCA-7), and In re Bartleson Co. 243 Fed. 1001 (D. C. Fla.), and as this decree was sustained by the decrees of October 3, 1935, as amended by the Decree of January 29, 1936 affirming the report of the Special Master under the decree of May 24, 1932, the court again erred. [958]

II.

Having thus erroneously granted the said refer-

ence, the court erred in the Decree of October 3, 1935, as amended January 29, 1936, by overruling Exception No. 1 filed for the Northern Pacific Railroad Company by attorneys for the Northern Pacific Railway Company to the first Report of the Special Master filed May 31, 1933, thus overruling the general motion to dismiss filed for the Northern Pacific Railroad Company by the attorneys for the Northern Pacific Railway Company. (Report, page 35).

III.

The Court erred in denying said general Motion to dismiss the Bill and Amended Bill, as the said Bill and Amended Bill did not put in issue the validity of the foreclosures of the mortgages claimed to have been executed by the Northern Pacific Railroad Company, which included the question or issue of the power of the Northern Pacific Railroad Company to place more than one mortgage on the lands granted, nor did the Bill or Amended Bill put in issue the other disputes mentioned in the last clause of Section 5 of the Act of June 25, 1929, which directed and made it mandatory on Attorney General to put in issue and to have determined by the court.

IV.

If the court held, as it now states it did, that the validity of the said mortgages was determined in confirming the first report of the Special Master, by the decree of Oct. 3, 1935 as amended Jan. 29,

1936, such ruling and determination was erroneous as the said validity of said mortgages was not pleaded, was not in issue, was not contested, and there was no evidence on the point, and the reference was on the pleading.

V.

Having thus erroneously granted the said reference, the court erred in the Decree of October 3, 1935, as amended January 29, 1936, by overruling Exception No. 2, filed for the Northern Pacific Railroad Company, by attorneys for the Northern Pacific Railway Company, to [959] the first Report of the Special Master filed May 31, 1933, thus holding that the plea of laches was not maintainable against the land grant. (Report, pages 36-37).

VI.

Having thus erroneously granted the said reference, the court erred in the Decree of October 3, 1935, as amended January 29, 1936, by overruling Exception No. 3, filed for the Northern Pacific Railroad Company by attorneys for the Northern Pacific Railway Company to the first Report of the Special Master filed May 31, 1933, thus overruling the plea of res adjudicata. (Report, page 38).

VII.

Having thus erroneously granted the said reference, the court erred in the Decree of October 3, 1935, as amended January 29, 1936, by overruling Exception No. 4, filed for the Northern Pacific Rail-

road Company by Attorneys for the Northern Pacific Railway Company to the first Report of the Special Master filed May 31, 1933. (Report page 95).

VIII.

The court erred in its decree of March 9, 1938, by denying the Motion of the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders, filed February 19, 1938, to construe, modify and amend the second report of the Special Master filed July 26, 1937, as the court thus left the Report confusing and contradictory as to the ownership of the Northern Pacific Railroad properties, lands and land grants, and the court further erred by refusing to construe and amend said report to make it state that title to and ownership of the Northern Pacific Railroad properties and lands and land grants were in the Northern Pacific Railroad Company, or to reserve the question of such title and ownership until it could be determined on the Answer and Cross-bill of the Northern Pacific Railroad Company filed by Charles E. Schmidt and [960] other minority stockholders, September 3, 1937, and or the Intervening Petition of Charles E. Schmidt and other minority stockholders filed January 31, 1938; the Masters Report indicates 34 plus, times that the property and lands belong to "the company" without indicating what company, 18-plus times to the Railway Company, and a number of times to the Railroad Company.

IX.

The Court also erred in its Decree of March 22nd, 1938, by denying the Petition and Motion to re-hear of the Northern Pacific Railroad Company by Charles E. Schmidt and other Minority Stockholders, filed March 11, 1938, on these points.

X.

The Court erred in its Decree of March 9, 1938, by striking the Answer and Cross-bill of the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders, filed September 3, 1937, as motions to strike go only to the form and not the merits, and the said Answer and Cross-Bill are perfect as to form, and no objection pointed out as to form; the Northern Pacific Railway Company filed a Motion to Strike the said Cross-bill and Answer, and plaintiff filed a Motion entitled, Motion to Strike, and asked that the Answer and Cross-bill be stricken, but it included a clause asking that Cross-bill be dismissed as it did not state a cause of action against the United States, but did not put up a defense of laches or any other specific defense.

XI.

The Court erred in its decree of March 22, 1938, by denying the Petition and Motion of the Northern Pacific Railroad Company to rehear the Decree of March 9, 1938, and to allow the Northern Pacific Railroad Company to amend at bar its cross-bill and answer by making the intervening Petition of Charles E. Schmidt and other minority stockholders,

and each of the allegations thereof, a part of the said cross-bill and Answer, as this would not have worked any [961] delay, the cross-bill and Answer had not been dismissed and the parties put out of court, but the cross-bill and Answer had only been stricken, and under the liberal rules of amending, the Railroad Company was entitled to amend as of right; there was no answer, plea or motion to strike or dismiss the said Petition and motion, or other objection thereto, filed, against the Motion to rehear and amend, and it was denied and not stricken; leave to amend was asked in Paragraph XXI, and others of cross-bill.

XII.

The Court erred in the Decree of March 9, 1938, by striking the joinder in the Motion of the Northern Pacific Railroad Company to re-refer the cause to the Special Master, which joinder was filed February 19th, 1938, as there was no Motion filed to strike the said joinder, (a) it was erroneous to strike it as the Northern Pacific Railroad Company is vitally interested in the report and having it properly completed by further reference, and (b) the Court cannot of its own motion, strike a pleading from the files as Motions to Strike go only to form.

XIII.

The Court erred in its decree of March 9, 1938, by striking the exceptions filed February 19, 1938, to report of July 26, 1937, by the Northern Pacific Railroad Company by Charles E. Schmidt and other

minority stockholders, as under the allegations of the Answer and Cross-bill which were not denied that ownership and title of the properties, lands and land grants of the Northern Pacific Railroad are in the Northern Pacific Railroad Company, and that the Northern Pacific Railway Company holding the Northern Pacific Railroad Company in captivity through the Northern Pacific Railway Company's Attorneys, filed a disclaimer of title and ownership of the Northern Pacific Railroad Company to the said property, lands and land grants, and was not properly representing, preserving or protecting the rights of the Northern Pacific Railroad Company;

The Court erred in its Decree of March 22, 1938, in denying the [962] Petition and Motion to rehear the Decree of March 9th, 1938, on the exceptions, as the allegations of the said Petition and Motion were not denied but admitted, and there was no Motion to Dismiss, strike or other objection filed against it, nor was there any denial of the allegations of the said Answer and Cross-Bill, and of the said Intervening Petition.

XIV.

The Court erred in its Decree of March 9th, 1938, in striking the Motion of the Northern Pacific Railroad Company for an extension of time to file exception to the Special Master's Report filed July 26th, 1937, as there was no Motion to Strike the said Motion to extend time, and the exceptions of the

Northern Pacific Railroad Company were filed on February 19th, 1938, prior to the hearing on the Motion to extend time; it is settled practice of the courts that when a Motion to Extend Time is filed for the performance of said Act, that if the Act is performed before the Motion is acted on, that the Motion to extend the time to the date of the actual filing will thereby, as a matter of course, be granted.

XV.

The Court erred in striking pleadings to which there were no Motions to Strike, thus holding that the court, of its own motion, can strike a pleading.

XVI.

As the Court gave as one reason for striking the Answer and Cross-bill of the Northern Pacific Railroad Company, by Charles E. Schmidt, and other minority stockholders, and for denying leave to file the Intervening Petition, that the court had by the Decree of October 3, 1935, as amended January 29, 1936, confirming the First Report of Special Master, held that the Mortgages claimed to have been executed by the Northern Pacific Railroad Company, were valid (and called upon the Special Master in Open [963] Court to confirm same) and as the Court thus erroneously construed and reviewed the decree of October 3, 1935, as amended January 29th, 1936, the Court erred in striking the said Answer and Cross-bill and in refusing leave to file said Intervening Petition, as a review and examination of the First Report of the Special Master

and the Decree of October 3, 1935, as amended January 29, 1936, confirming said report, will clearly demonstrate that the Court did not attempt to, nor in any manner, determine that said mortgages were valid.

XVII.

The Court erred in striking out the Cross-bill and Answer of the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders, as facts alleged therein, and admitted as true, show the title of the Northern Pacific Railroad Company properties, lands and land grants had never passed out of the Northern Pacific Railroad Company, and that the Northern Pacific Railway Company had been absorbed by or was owned by the Northern Pacific Railroad Company, and that the Northern Pacific Railway Company was never organized, and Acts purporting to amend its charter were void and unconstitutional, and all that the Northern Pacific Railway Company attempted to do was ultra vires and void; that further, because the Northern Pacific Railroad Company had no power under its Charter or laws to sell or convey its properties or lands, or to give a long time lease on same, and the Northern Pacific Railway Company under the laws of Wisconsin and the other states, traversed by the Northern Pacific Railroad system was not given authority or power to purchase, receive or have turned over to it by lease or other contract, the said Northern Pacific Railroad Company property.

XVIII.

The Court erred in stating and holding that laches prevented the Northern Pacific Railroad Company from seeking to prevent in this suit the Northern Pacific Railway Company from unlawfully seizing [964] and taking possession of lands under the land grant, or their value, which said land or land grants had not been heretofore seized or taken possession of or any title thereto given to the Northern Pacific Railway Company, and the same is not yet in its power or possession, and neither laches or the statute of limitations would begin to run until the Northern Pacific Railway Company actually obtained possession. The Court held this, notwithstanding the petitioners who filed an Answer and cross-bill began in 1897 and 1898, and have continued persistently to date to have the rights of the Northern Pacific Railroad Company determined and possession of its Railroad System land grants and property, title to which has never gone out to the Northern Pacific Railroad Company, restored to the Northern Pacific Railroad Company; and further, that the minority stockholders on behalf of themselves and petitioners, and aided by them on November 21st, 1900, instituted a suit in the Circuit Court of the United States in the Southern District of New York, seeking relief sought in the answer and cross-bill, which suit is still pending and undetermined, and was recently revived by the Court in the name of the Executor of the Plaintiff, and further these petitioners had since 1900 con-

tinuously sought a Congressional Investigation so as to obtain the facts set out in the Answer and Cross-bill and Intervening Petition, which were hidden and secreted by the Northern Pacific Railway Company, and other facts, which are still hidden and secreted by the Railway Company and Petitioners believe they can state, without fear of successful challenge, that but for the continuous acts and efforts of the Petitioners, the Joint Congressional Committee investigation of 1925, resulting in the Act of June 25, 1929, would never have been obtained, or the Act passed, or this suit authorized but for such efforts of the Petitioners and information they furnished the Government.

XIX.

The Court erred in its Decree of March 22nd, 1938, in denying on the merits, and not striking the Motion to Dismiss the Bill and [965] Amended Bill of Complaint, which Motion was filed by the Northern Pacific Railroad Company by Charles E. Schmidt and Minority Stockholders, March 17, 1938, and in not granting the Motion and giving leave to and requiring the plaintiff to file an Amended Bill putting in issue the validity of the foreclosure of the mortgages claimed to have been executed by the Railroad Company and the other matters required by the mandate of the Act of June 25, 1929, as set out in part in the said Motion, and as shown by the said Act.

XX.

The Court erred in holding that the United States was not estopped to object to or oppose the answer and cross-bill and the Motion to Amend same, or the intervening petition, or to move to strike or dismiss either because the Attorney General failed to put in issue or prosecute to determination the validity of the two foreclosures of the mortgages and the disputes set out in the last clause of Section 5 in the Act of June 25, 1929 (46 Stats. 41).

XXI.

The Court erred in holding that the Northern Pacific Railroad Company was not estopped to object to or oppose the Answer or Cross-bill, or Motion to Amend same, or the Intervening Petition, or move to strike either, because the Northern Pacific Railway Company illegally and unlawfully, without any power or authority under its Charter, or by any State Law to do so, had seized and is holding all of the property, lands and land-grants of the Railroad Company, except such as are involved in this suit and had unlawfully taken and placed the Northern Pacific Railroad Company in captivity under its domination and control, and while so illegally and unlawfully holding said Northern Pacific Railroad Company in such captivity, since 1897, the Northern Pacific Railway Company had filed, through its attorneys, a disclaimer of any claim or interest of the Northern Pacific Railroad Company in and to any properties, lands or land

grants under the Act of July 2, 1864, and the Northern Pacific Railway Company is now in this suit seeking to and [966] endeavoring to unlawfully and illegally seize and take possession of lands or their value, of the Northern Pacific Railroad Company, which the Northern Pacific Railway Company had not heretofore been able to seize and take possession of as is shown by the allegations of the Answer and Cross-bill and Intervening Petition, which allegations on the Motions are not denied, but admitted to be true.

XXII.

The Court erred in refusing to hold that as alleged in the Answer and Cross-Bill and Intervening Petition, and admitted, that when Congress passed the Act of June 25, 1929, it made it mandatory on the Attorney General, and the Court, to have determined in the suit under proper allegations in the Bill of Complaint, all the rights of the Northern Pacific Railroad Company, and the Northern Pacific Railway Company, as is shown by Chairman Colton's Report for the committee to the House, and as these matters were purposely left open for future determination by Act of July 1, 1898, (30 Stats. 620), and by the said Act Congress purposely agreed and gave its consent for the United States to be sued or to be a party to litigation between the Northern Pacific Railroad Company and the Northern Pacific Railway Company, as Congress construed the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, to make it mandatory that

the United States be a party to all suits and litigations involving the land, land-grants and mortgages authorized thereunder, and that such rights could not be determined in any other litigation, as the United States could not be made a party to any other such litigation.

XXIII.

The Court erred in holding that it is now too late for the Answer and Cross-bill and Intervening Petition to be filed in this cause, notwithstanding it took the court, and parties, five years, six months and twenty-eight days from July 31, 1930 to January 29, 1936, to settle the pleadings, at a cost considerably in excess of $25,000.00, on January 29th, 1936, and until that time the minority stockholders [967] did not definitely know, and could not know, that the Attorney General, in dereliction of his duty, and the Mandate of Congress to him and the court, would ignore the mandatory direction of the Court requiring him to have all rights of the Northern Pacific Railroad Company and Northern Pacific Railway Company to the land, land grants and properties, and the validity of the foreclosure of the mortgages in 1875 and 1896 determined, and further, notwithstanding that the Northern Pacific Railway Company is now in this suit trying to illegally and unlawfully grab, take, seize and possess further and other lands, or their value of the Northern Pacific Railroad Company, while the Northern Pacific Railway Company holds the Northern Pacific Railroad Company in captivity.

XXIV.

The Court erred in stating in its decision that the Petitioners on behalf of the Northern Pacific Railway Company can come back into this cause to determine the ownership of the fund established after such fund is established, but refused to put in the Decree words confirming such decision, but used words which would be construed to create res adjudicata to further proceedings on behalf of the Northern Pacific Railroad Company in this cause, and in addition to that the court denied the Motion of the Northern Pacific Railroad Company to construe, modify and amend the Report of the Special Master filed July 26, 1937.

XXV.

The Court erred in sustaining the plaintiff's Exception numbered 12, involving Absaroka and Beartooth forest .

XXVI.

The court erred in sustaining plaintiff's Exceptions Nos. 16 to 27 inclusive, and Nos. 38 and 39, involving substitution of base.

XXVII.

The court erred in sustaining the plaintiff's Exception numbered 40, 43(a), (b), (d) and (e), 44, 48, and 49, involving the [968] availability of withdrawing lands for indemnity selection, and Nos. 55 and 56 involving Fort Ellis Military Reservation.

XXVIII.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 1.

XXIX.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 2, involving the Portland Oregon & Tacoma Washington overlap.

XXX.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 3, involving losses in the Second Indemnity limits of a particular state.

XXXI.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 4.

Dated this 22nd day of March, 1938.

ROBERT L. EDMISTON
THOMAS BOYLAN
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE, JR.

Attorneys for Chas. E. Schmidt and other minority stockholders of Northern Pacific Railroad Company, Intervening Petitioners.

[Endorsed]: Filed March 22, 1938. [969]

[Title of District Court and Cause.]

AMENDMENT TO ASSIGNMENTS OF ERROR.

Now Comes Northern Pacific Railroad Company by Charles E. Schmidt, et al, and amends its Assignment of Errors filed herein March 22nd, 1938,

by adding a new, No. 32, paragraph thereto, to-wit:

No. XXXII. The Court erred in the Orders of March 9th, 1938, and of March 22nd, 1938, in striking out the Answer and Cross-Bill, in not permitting the filing of the Intervention Petition, and in not requiring the Northern Pacific Railway Company and plaintiff to answer same, and in not requiring the Northern Pacific Railway Company to answer the Interrogatories and produce the papers and documents called for in the interrogatories, as this Appellant is entitled, and it is necessary for appellant in preparation for the hearing on the ownership of the funds and property to be established, to have said data and documents.

Dated this 25th day of March, 1938.

ROBERT L. EDMISTON
THOMAS BOYLAN
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE, JR.
Attys. for Charles E. Schmidt & other minority stockholders of Northern Pacific Railroad Company.

Service by.....copies hereof acknowledged this .....day of March, 1938.

.....
Of Attys. for Plaintiff-Appellee.

.....
Of Attys. for Defendants, Appellees.

[Endorsed]: Filed March 26, 1938. [970]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR OF CHARLES E. SCHMIDT AND OTHER INTERVENING PETITIONERS.

Now comes Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal, and Walter L. Haehnlen, on behalf of themselves and all other minority stockholders of the Northern Pacific Railroad Company, and present and file the following Assignment of Errors on Appeal.

I.

The Court erred in denying leave to file the Intervening Petition of these petitioners filed on January 31, 1938, as the said Petition stated a good cause of action is timely and sought relief and prevention of delivery to the Northern Pacific Railway Company, of lands or other value, which the said Northern Pacific Railroad Company had not taken possession of, but which it is seeking in this suit.

[971]

II.

These Petitioners adopt and make part of this Assignment of Errors, each and all the Assignments of Error filed by the Northern Pacific Railroad Company by Charles E. Schmidt, and other minority stockholders in this cause, this day, except Assignments of Error Number 10 and Number 11, and make such Assignments of Errors applicable to all pleadings filed by these petitioners.

Dated this 22nd day of March, 1938.

ROBERT L. EDMISTON
THOMAS BOYLAN
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE, JR.
Attorneys for Charles E. Schmidt and other Intervening Petitioners.

[Endorsed]: Filed March 22, 1938. [972]

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court in and for the Eastern District of Washington, do hereby certify that the annexed and foregoing is a true and correct copy of the original.

1. Bill of Complaint filed July 31, 1930, and Exhibits "M" and "N" to said Complaint.

2. Voluntary Appearance of Defendants filed September 10, 1930.

3. Appearance of Attorneys for Northern Pacific Railway Company filed December 5, 1930.

4. Stipulation of Amendments to Bill of Complaint filed June 25, 1931.

5. Order approving stipulation covering amendments filed June 25, 1931.

6. Amended and Supplemental Answer of Defendant Northern Pacific Railway Company filed July 18, 1931.

7. Request for hearing on points of law by Northern Pacific Railway Company and N. W. Improvement Company filed July 18, 1931.

8. Disclaimer of Northern Pacific Railroad Company filed January 18, 1932.

9. Plaintiff's motion to strike Disclaimer of Northern Pacific Railroad Company filed February 13, 1932.

10. Answer of Northern Pacific Railroad Company filed May 9, 1932.

11. Request for hearing on points of law by Northern Pacific Railroad Company filed May 9, 1932.

12. Order of reference to Special Master of May 24, 1932.

13. Special Master's first Report filed May 31, 1933.

14. Exceptions of Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed June 20, 1933 to First Report of Special Master.

15. Plaintiff's exceptions filed July 8, 1933 to First Report of Special Master. [973]

16. Order of compensation to Special Master dated January 25, 1934.

17. Memorandum Opinion of Court on Exceptions to Special Master's First Report filed September 9, 1935.

18. Order pursuant to opinion on Exceptions to Special Master's First Report dated October 3, 1935.

19. Order of January 29, 1936 amending order dated October 3, 1935.

20. Order of April 21, 1936 for further reference to Special Master Graves.

21. Appearance of L. B. daPonte for Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed July 22, 1937.

22. Special Master's Second Report filed July 26, 1937.

23. Exceptions of Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed August 9, 1937 to the Master's Second Report.

24. Supplemental Exceptions of Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed August 11, 1937 to Master's Second Report.

25. Plaintiff's Exceptions filed August 13, 1937 to Master's Second Report.

26. Motion of Minority Stockholders of Northern Pacific Railroad Company filed August 25, 1937 for extension of time to file Exceptions to Master's Second Report.

27. Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders filed September 3, 1937.

28. Plaintiff's Motion filed September 13, 1937 to Strike Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders.

29. Motion of Northern Pacific Railway Company, Northern Pacific Railroad Company and

Northwestern Improvement Company filed September 15, 1937 to Strike Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders.

30. Motion of Minority Stockholders of Northern Pacific [974] Railroad Company for leave to file Petition in intervention filed January 31, 1938.

31. Intervening Petition filed with said Motion January 31, 1938.

32. Appearance of counsel for Northern Pacific Railroad Company by Minority Stockholders filed February 14, 1938.

33. Appearance of counsel for Minority Stockholders as intervening Petitioners filed February 14, 1938.

34. Motion of Northern Pacific Railroad Company by Minority Stockholders to construe, modify and amend filed February 19, 1938, the Second Report of Special Master.

35. Exceptions filed February 19, 1938 of Northern Pacific Railroad Company by Minority Stockholders, and of Minority Stockholders—Intervening Petitioners—to Second report of Special Master.

36. Order of March 9, 1938 denying leave to intervene and striking Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders.

37. Petition of Northern Pacific Railroad Company by Minority Stockholders filed March 11, 1938 to review and amend order of March 9, 1938.

38. Petition of Minority Stockholders—Intervening Petitioners—filed March 11, 1938 to review and amend order of March 9, 1938.

39. Motion of Northern Pacific Railroad Company by Minority Stockholders filed March 17, 1938 to dismiss original and amended Bill of Complaint.

40. Order of March 22, 1938 denying petitions to review and amend order of—March 9, 1938.

41. Order of March 22, 1938, on Exceptions to Master's Second Report—sustaining some, denying others.

42. Assignment of Errors of Northern Pacific Railroad Company by Minority Stockholders filed March 22, 1938.

43. Amendment to Assignment of Errors of Northern Pacific Railroad Company by Minority Stockholders filed March 25, 1938.

44. Assignment of Errors of Minority Stockholders—Intervening [975] Petitioners filed March 22, 1938, as the same now remains on file and of record in my office at Spokane, Washington.

I further certify that the fees of the clerk of this court for preparing and certifying the foregoing typewritten copies amount to the sum of $132.00, and that the same have been paid in full by R. L. Edmiston, of attorneys for the intervening petitioners.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Spokane, Washington, this 4th day of August, A. D. 1938.

[Seal] A. A. LaFRAMBOISE,
Clerk [976]

[Title of District Court and Cause.]

ANSWER AND CROSS BILL OF THE NORTHERN PACIFIC RAILROAD COMPANY BY SCHMIDT AND OTHERS, MINORITY STOCKHOLDERS TO THE AMENDMENT TO THE AMENDED BILL OF THE PLAINTIFF FILED AUGUST 1, 1938.

Now comes the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and for answer and by way of cross bill to the amendment to the amended bill of the plaintiff filed in this cause August 1, 1938, without waiving this defendant's motion to strike the said amendment to the amended bill of the plaintiff, which motion was filed August 29, 1938, but which is specifically reserved, ratified and insisted upon, and further without waiving this defendant's motion heretofore filed to dismiss the amended bill but specifically reserving, affirming and insisting on same, for answer says:

1. That the said amended bill of the plaintiff with the amendment should be dismissed, as it does not set forth a cause of action under the Act of June 25, 1929 and is in violation of said statute and should be dismissed.

2. Further answering the said amended bill with the amendment, these defendants deny that the monies and property mentioned [977] therein belong to the United States or to the Northern Pacific Railway Company but are the property and monies of the Northern Pacific Railroad Company.

3. For further answer to the said amended bill with the amendment, the answer and cross bill of the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders filed in this cause September 3, 1937 be and the same is hereby referred to, adopted and made a part of this answer the same as if set out and reiterated herein verbatim.

4. For further answer to the said amended bill with the amendment, the intervening petition of Schmidt and others filed in this cause January 31, 1938 is referred to, adopted and made a part of this answer the same as if set out and reiterated herein verbatim; the said Northern Pacific Railroad Company by Schmidt and others, minority stockholders, having during the argument of this cause in March, 1938 asked leave to amend the said answer and cross bill of September 3, 1937 by making the said intervening petition a part thereof.

Wherefore, having fully answered the said amended bill with the amendment, the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, pray that the said amended bill with the amendment be dismissed and all the relief asked for therein denied. and that all the prayers of the answer and cross bill filed September 3, 1937 and the intervening petition filed January 31, 1938 and the interrogatories attached to and filed with the said intervening petition January 31, 1938, are hereby referred to, adopted, ratified and made a part of the prayers of this answer

and cross bill the same as if set out and reiterated herein verbatim; and it is further prayed that [978] the parties named therein be required to answer the same as directed in the said answer and cross bill, intervening petition and interrogatories.

WALTER L. HAEHNLEN
CHARLES E. SCHMIDT
GEORGE LANDELL,
Executor of E. A. Landell
CLARENCE LOEBENTHAL
Trustee of Bernard Loebenthal

THOMAS BOYLAN
Liberty Trust Building
Philadelphia, Pennsylvania.
ROBERT L. EDMISTON
Title Building
Spokane, Washington.
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE, JR.
Peoples Life Insurance Bldg.
Washington, D. C.
Attorneys for Minority Stockholders of N. P. R. R. Co.

State of Pennsylvania
County of Philadelphia—ss:

I, Clarence Loebenthal, being first duly sworn, depose and state that I am one of the minority stockholders mentioned in the answer and cross bill filed September 3, 1937, in this cause and I hereby cer-

tify that the facts and statements set forth in the foregoing answer and cross bill are true to the best of my knowledge, information and belief.

CLARENCE LOEBENTHAL [979]

Subscribed and sworn to and given under my hand and official seal this the 31st day of August, 1938.

[Seal] CLAUDE E. FRENCH
Notary Public, State of Pennsylvania, County of Philadelphia.
Notary Public.

My Commission expires April 8, 1941.

[Endorsed]: Filed Sept. 3, 1938. [980]

[Title of District Court and Cause.]

RETURN OF SERVICE

State of Washington
County of Spokane—ss.

Robert L. Edmiston being duly sworn on oath says; affiant is one of the Attorneys of record for the above named defendant, Northern Pacific Railroad Company, by Charles E. Schmidt and others, minority stockholders of the Northern Pacific Railroad Company.

That affiant served Answer and Cross-bill of said Northern Pacific Railroad Company by minority stockholders hereto attached, on the defendants and each of them named in said answer and cross-bill, by delivering two true copies thereof at the office of Francis J. McKevitt, Attorney of Record for said

defendants and each of them, in the First National Bank Building, in the city and county of Spokane, State of Washington, by delivering to and leaving the same with Inga Quesset, the Secretary and Stenographer of the said Francis J. McKevitt, in charge of his said office, the said copies for the said Francis J. McKevitt, he being absent therefrom and absent from the city and county of Spokane. The said Inga Quesset being in charge of said office as said Secretary and Stenographer, on this the 3rd day of September, A. D. 1938.

That affiant served said Answer and Cross-bill upon the above named plaintiff, United States of America, by delivering to and leaving at the office of Sam M. Driver, attorney of record for said plaintiff, a copy of said answer and cross bill, in the city and county of Spokane, on the 3rd day of September, A. D. 1938, by delivery to L. Keith, assistant to said Sam M. Driver, in charge of his office.

ROBERT L. EDMISTON

Subscribed and sworn to before me this 3rd day of September, 1938.

[Seal] ALBERT H. SUNDAHL

Notary Public in and for the State of Washington, residing at Spokane, Wash. [981]

CERTIFIED COPY

United States of America
Eastern District of Washington—ss:

I, A. A. LaFramboise, Clerk of the United States District Court in and for the Eastern District of Washington, do hereby certify that the annexed and foregoing is a true and full copy of the original Answer and Cross Bill of the Northern Pacific Railroad Company by Schmidt and Others, Minority Stockholders to the Amendment to the Amended Bill of the Plaintiff Filed August 1, 1938, together with Return of Service of Said Answer, both filed September 3, 1938, in cause entitled U. S. A. vs. N. P. Ry. Co., a corporation, et al, No. E-4389, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Spokane this 3d day of September, A. D. 1938.

[Seal] A. A. LaFRAMBOISE
Clerk.

By E. L. COLBY
Deputy Clerk.

[Endorsed]: Filed in the U. S. District Court Sept. 3, 1938.

[Endorsed]: Filed U. S. C. C. A. Sept. 6, 1938.

[982]

[Title of District Court and Cause.]

APPEAL PETITION OF INTERVENING PETITIONERS TO UNITED STATES CIRCUIT COURT OF APPEALS FOR NINTH CIRCUIT.

To The Honorable J. Stanley Webster, Judge of the District Court of the United States for the Eastern District of Washington, Northern Division.

Your petitioners, Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal, and Walter L. Haehnlen, on behalf of themselves and other Minority Stockholders of the Northern Pacific Railroad Company, intervening Petitioners in the above entitled cause, respectfully represent and show that in said cause pending in the District Court of the United States for the Eastern District of Washington, Northern Division, there was entered on the 24th day of May, 1932, an Order referring the cause to a Special Master, and an Order was entered on October 3, 1935, and Amended January 29th, 1936, confirming the Report of the said Special Master under the Decree of May 24th, 1932.

That on March 9th, 1938, an Order was entered denying (among other things) the Motions of the Northern Pacific Railroad Company and petitioners, to construe, modify and amend the Report of the [983] Special Master, filed July 26th, 1937, under the Order of Reference of April 21, 1936, and strik-

ing out the exceptions of the Railroad Company to said Report.

That on March 22, 1938, Orders were entered overruling, among other things, exceptions to the said Report of the Special Master, filed July 26, 1937, denying a Motion to Dismiss and a Petition to Rehear, and sustaining exceptions of the Plaintiff to said Report. Each of which Orders is greatly to the prejudice and injury of your Petitioners, and is erroneous and inequitable, and same and each of them are now there appealed from to the United States Circuit Court of Appeals, Ninth Circuit, at San Francisco, California.

Wherefore in Order that your Petitioners may obtain relief in the premises and have opportunity to show the errors complained of, your petitioners pray that they may be allowed to appeal from each of said orders or decrees in said cause to the United States Circuit Court of Appeals for Ninth Circuit, at San Francisco, California, agreeable to the statutes and rules of the Court in such case made and provided, and that proper orders touching the security required of them be made.

Dated this 24 day of May, 1938.

ROBERT L. EDMISTON
THOMAS BOYLAN
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE, JR.
Attorneys for Petitioners
Charles E. Schmidt and others.

Appeal allowed upon giving bond as required by law in the sum of $500.00.

.....

Judge.

Due and timely service of the foregoing Petition by receipt of a true copy thereof acknowledged this .....day of May, 1938.

.....

Attorneys for Plaintiff, appellee.

.....

Attorneys for Defendant, appellees.

[Endorsed]: Filed May 24, 1938. [984]

[Title of District Court and Cause.]

INTERVENERS' ASSIGNMENTS OF ERROR

Now comes intervening defendants Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal, and Walter L. Haehnlen, minority stockholders, on behalf of themselves and all other minority stockholders of the Northern Pacific Railroad Company, and present and file the following Assignment of Errors on Appeal.

I.

The Court erred in denying leave to file the intervening Petition of these petitioners filed on January 31, 1938, as the said Petition stated a good cause of action is timely and sought, among other

things, relief and prevention of delivery to the Northern Pacific Railway Company of lands or other value, which the said Northern Pacific Railway Company had not taken possession of, but which it is seeking in this suit.

II.

These Petitioners adopt and make part of this Assignment of errors, each and all the Assignments of Error filed by the Northern Pacific Railroad Company by Charles E. Schmidt, and other minority stockholders in this cause, this day, except Assignments of Error Number 10 and number 11, and make such Assignments of Errors applicable to all pleadings filed by these petitioners.

Dated this 24th day of May, 1938.

ROBERT L. EDMISTON
THOMAS BOYLAN
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE, JR.
Attorneys for Charles E. Schmidt and other Intervening Petitioners.

Due service of the foregoing Assignment of Errors, and receipt of ..... copies thereof, is hereby acknowledged this ..... day of May, A. D. 1938.

.....

Attorney of record for Appellee, Plaintiffs
Attorney of record for the said Appellee, Defendants.

CERTIFIED COPY

United States of America,
Eastern District of Washington.—ss.

I, A. A. LaFramboise, Clerk of the United States District Court in and for the Eastern District of Washington, do hereby certify that the annexed and foregoing is a true and full copy of the original Appeal Petition of Intervening Petitioners to the United States Circuit Court of Appeals for Ninth Circuit (filed May 24, 1938), Interveners' Assignments of Error (filed May 24, 1938), Assignments of Error of the Northern Pacific Railroad Company by Charles E. Schmidt and Other Minority Stockholders on Appeal to United States Circuit Court of Appeals for the Ninth Circuit (filed May 24, 1938), and Order Denying Appeal of Intervening Northern Pacific Railroad Company, Minority Stockholders to United States Circuit Court of Appeals, Ninth Circuit (filed June 1, 1938), in cause entitled United States of America, Plaintiff, vs. Northern Pacific Railway Company, a corporation, et al, Defendants, Northern Pacific Railroad Company by Charles E. Schmidt and other Minority Stockholders, Appellants, Charles E. Schmidt, et al, Intervenors, Appellants, No. E-4389, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the afore-

said Court at Spokane this 2d day of June, A. D. 1938.

[Seal] A. A. LaFRAMBOISE,
Clerk

By.....
Deputy Clerk

[Endorsed]: Filed in the U. S. District Court May 24, 1938.

[Endorsed]: Filed U. S. C. C. A. June 4, 1938.

[Title of District Court and Cause.]

STIPULATION RELATIVE TO DEFENDANTS' MOTION TO RE-REFER AND AMENDMENT TO BILL OF COMPLAINT

It is stipulated between counsel for the respective parties as follows:

I.

That, pursuant to defendants' motion to re-refer for making certain proof concerning non-coal and non-iron character of lands selected with Portage base held invalid by the court, such proof may be made by the affidavit of Verner A. Gilles, copy of which shall be received in evidence as a part of the record in this cause and plaintiff will not question the sufficiency nor controvert such proof of non-coal and non-iron character of said lands.

II.

It is further stipulated that the amended complaint may be treated and considered as further amended as follows:

First: By inserting therein following subdivision XXV a new and additional subdivision to be designated subdivision "XXV A" reading as follows:

"That on May 7, 1868, a reservation was created in the then Territory of Montana for the Crow Indians; that thereafter, to-wit, on June 27, 1881, while said Indian Reservation was in full force and effect a portion of the route of the Northern Pacific Railroad in Montana was definitely located through said Reservation; that the lands within said reservation and embraced within the primary limits of the grant to said Northern Pacific Railroad Company were, under the provisions of the granting act, excepted from said grant; that thereafter, to-wit, on April 11, 1882, a part of the lands within said Reservation were purchased by the plaintiff from the Indians and said lands were ceded by said Indians to the United States; that thereafter the Northern Pacific Railway Company filed selection lists in plaintiff's Land Offices, thereby selecting 67,675.49 acres of the land so purchased by the plaintiff and within said primary limits, assigning as base for the selection of such lands other lands within the primary limits of the grant which were found to be mineral in character and were therefore excepted from the grant; the numerical descriptions of the lands so selected are set forth in tabulations hereto attached and marked Exhibits FF1 and FF2; that thereafter the offi-

cers and agents of the Interior Department of the United States, without any authority of law so to do, and through inadvertence, error and mistake, erroneously issued and delivered to the said Railway Company patents covering 63,-295.02 acres of the land so selected, leaving unpatented 4,380.47 acres of said selected lands; that the execution and delivery of said patents were without any authority of law and said patents were and are void, all of which was at all times known to said Companies; that upon the issuance by the United States of the said patents, and by virtue thereof, the said Railway Company assumed the complete ownership of said lands, including the right of possession thereof and all the rights usually attaching to ownership of such lands; that notwithstanding the said patented lands and each and all of them were erroneously and wrongfully obtained from the United States by said Railway Company as herein alleged, said lands have never been reconveyed to the plaintiff herein but on the contrary extensive areas of said lands have been sold to third persons; that large sums of money have been received by the said Railway Company through sales and leases of said lands, all of which moneys, together with interest thereon, rightfully belong to the United States."

Second: By inserting in the prayer of said amended bill of complaint following paragraph (4) thereof on page 99 a new and additional paragraph to be designated "4a" and reading as follows:

"That in the adjustment of said grants the defendant Northern Pacific Railway Company be required to account to the plaintiff for the moneys and other values received by it from such of the patented lands referred to in subdivision XXV A of this amended bill as have been sold or disposed of by said Company, together with interest thereon from the respective dates of the receipt of such moneys or values; that said Company be required to account to the plaintiff for the value of such of said patented lands as have not been sold or disposed of by it together with the rental value thereof since said lands were patented to said Company; that plaintiff be adjudged to be the owner of the unpatented lands referred to in Subdivision XXV A, freed of any claim of the defendants thereto; and that the selection lists by which said Company has attempted to select said lands be declared void and that they be cancelled."

III.

It is further stipulated that plaintiff may withdraw from the concession which it made during the argument before the Master that certain lands embraced within the area of the Ainsworth and Portland Terminal errors and for which the plaintiff had theretofore asked compensation, might be charged to the grant and that plaintiff may be in the same position it would have been with respect to such lands had that concession not been made.

IV.

It is further stipulated that plaintiff may prove the numerical descriptions of the lands involved in the Ainsworth and Portland Terminal errors and the Crow restoration lands by the introduction of evidence in the following manner: A tabulation of the lands which are referred to in this stipulation will be presented by plaintiff to defendants for examination and if found correct will be received in evidence without the necessity of producing any witness to testify thereto. It is further understood that at such time as the parties shall be able to do so they shall present this stipulation to the court and the questions for decision mentioned in paragraphs II and III will be presented and disposed of as the court shall determine.

V.

It is further stipulated that defendants may amend their answer, if so advised, and offer such evidence on the issues made by Paragraphs II, III and IV of the stipulation as they may be advised is appropriate thereto, and plaintiff may, if so advised, offer rebuttal evidence.

Dated July 22, 1938.

WALTER L. POPE (D)
E. E. DANLY
Solicitors for Plaintiff

L. B. DaPONTE
D. R. FROST
F. J. McKEVITT
Solicitors for Defendants

[Endorsed]: Filed July 26, 1938.

[Title of District Court and Cause.]

ORDER ON STIPULATION RELATIVE TO DEFENDANTS' MOTION TO RE-REFER AND AMENDMENT TO BILL OF COMPLAINT

Upon consideration of stipulation of counsel dated July 22, 1938, it is ordered that the same be and is hereby approved, that the affidavit of Verner A. Gilles is received in evidence and made a part of the record in this cause, that the complaint may be amended as provided in said stipulation, that the plaintiff may withdraw from the concession referred to in said stipulation, and that said stipulation may govern the further proceedings in this cause as therein provided.

Dated Aug. 1st, 1938.

J. STANLEY WEBSTER
District Judge

Approved as to form:

.....

.....

Solicitors for Plaintiff
L. B. DaPONTE
F. J. McKEVITT
Solicitors for Defendants

[Endorsed]: Filed Aug. 1, 1938.

CERTIFIED COPY

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court in and for the Eastern District of Washington, do hereby certify that the annexed and foregoing is a true and full copy of the original Stipulation Relative to Defendants' Motion to Re-refer and Amendment to Bill of Complaint, filed July 26, 1938, and Order On Stipulation Relative to Defendants' Motion to Re-refer and Amendment to Bill of Complaint, signed and filed August 1, 1938, in cause entitled United States of America, Plaintiff, vs. Northern Pacific Railway Company, a corporation, et al, Defendants, No. E-4389, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Spokane this 17th day of August, A. D. 1938.

[Seal] A. A. LaFRAMBOISE,
Clerk

By E. L. COLBY,
Deputy Clerk

[Endorsed]: Filed U. S. C. C. A. Aug. 18, 1938.

[Title of District Court and Cause.]

MOTION TO STRIKE OUT STIPULATION, AMENDMENT TO AMENDED BILL AND PRAYER, AND TO VACATE AND MODIFY THE DECREE OF AUGUST 1, 1938.

1. Now comes the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and now also come Charles E. Schmidt and others, minority stockholders of the Northern Pacific Railroad Company, intervening petitioners, and move the Court to strike out the stipulation dated July 22, 1938 and approved by the decree of August 1, 1938, for reasons hereinafter set out.

2. Now comes the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and now also come Charles E. Schmidt and others, minority stockholders of the Northern Pacific Railroad Company, intervening petitioners, and move the Court to strike out, for the reasons hereinafter set out, the amendment to the complaint set out in the said stipulation and allowed by the decree of August 1, 1938, which said proposed amendment added Subdivision "XXV A" immediately following Subdivision "XXV" of the amended bill and amended the prayers of the amended bill of complaint by adding a paragraph and prayer designated "4a" after paragraph 4.

3. That the decree of August 1, 1938 be vacated and modified for the reasons hereinafter set out.

The Government should not be permitted to amend the bill and prayers until and unless it so amends the bill to comply with the mandate of the statute and put in issue the validity of the foreclosures of the mortgages and all the other issues before the Joint Congressional Committee and other issues set out in Section 5 of the Act of June 25, 1929 (46 Stats. 41, U. S. Code Title 43, sections 921-929), all of which has heretofore been presented to and urged on the Court by these Movants in their motions, cross bill and other pleadings and in the intervening petition.

The Government at the request of these Movants had promised to furnish these Movants with a copy of the proposed amendment to the amended bill of complaint in time for these Movants to file objections and a date then be fixed for the argument of same, but as shown by the following correspondence between Assistant Attorney General Carl McFarland and his assistants and the counsel for these Movants, said amendment was mailed July 28, 1938 from Missoula, Montana but before or on the day it reached attorneys for these Movants in Washington, D. C., the decree of August 1, 1938 was entered. The correspondence is as follows:

"April 11, 1938.

United States vs. Northern Pacific Railroad Company, et als., No. E-4389 U. S. District Court, Spokane.

Hon. Homer Cummings,
Attorney General of the United States,
Washington, D. C.

My dear Mr. Cummings:

In behalf of the Northern Pacific Railroad Company by Charles E. Schmidt and others, non-assenting and minority stockholders, we are calling upon you to rectify the bill and amended bill of complaint in the above suit to make them comply with the mandate of the Statute of June 25, 1929 (46 Stats. 41).

We realize that the bill and amended bill were drafted and filed by a former Attorney General but the pleadings were not closed until the decree of October 3, 1935, as amended by the decree of January 29, 1936, overruling and sustaining motions to dismiss various paragraphs of the bill and overruling and sustaining various pleas. Section 5 of the Act of June 25, 1929 authorizes and directs the Attorney General to execute and prosecute a suit to have determined, among other things, 'the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed upon the said granted land by virtue of the authority conferred in said resolution of May 31, 1870.'

This logically includes the validity of the mortgages and the title under the alleged so-called foreclosure of 1896. The bill and amended bill do not raise these issues or seek to have these matters determined and Special Master Graves in his first report states: 'The Government neither by the bill nor in argument is attempting to set aside the decrees of foreclosure or the sales under those decrees.' In two prayers of the bill judgment is asked against the railway company and not against the railroad company and nowhere is judgment asked against the railroad company.

Thus the bill assumes and withdraws from consideration and determination the question of title and ownership of the land grants as between the railroad company and the railway company, which we think is clearly contrary to the mandate of the Act of June 25, 1929.

Thanking you in advance for due and proper consideration of this matter and a rectification thereof, we are

Cordially yours,
ROBERT L. EDMISTON,
THOMAS BOYLAN,
HUDSON, CREYKE & HUDSON,
By RAYMOND M. HUDSON.

RMH:S

CC: L. B. daPonte, Esq., General Counsel, Northern Pacific Railway Company, St. Paul, Minnesota''.

"Department of Justice
Washington, D. C.

April 16, 1938.

Messrs. Hudson, Creyke & Hudson,
Attorneys at Law,
404-8 Peoples Life Insurance Building,
1343 H Street, N. W.
Washington, D. C.

Sirs:

I am in receipt of your letter of April 11, 1938 asking me to amend the bill of complaint in the case of United States v. Northern Pacific Railway Company et al., No. E-4389 pending in the District Court of the United States for the Eastern District of Washington.

I do not agree with your contention that the allegations contained in said bill do not comply with the requirements of the Act of June 25, 1929 (46 Stats. 41). I must, therefore, decline to grant your request.

Respectfully,
For the Attorney General,
(s) CARL McFARLAND,
Assistant Attorney General."

"July 7, 1938.

United States v. Northern Pacific
No. E 4389 DCED Washington

Carl McFarland, Esq.
Department of Justice
City.

My dear Mr. McFarland:

Referring to yours of April 14, 1938 wherein you promised to furnish us with a copy of the proposed findings of facts and conclusions of law and the decree thereon in the above suit, we are wondering whether or not they are now available.

As about last October or November the Government gave notice that it would apply for leave to file an amended bill or an amendmnt to its bill and some six weeks ago Mr. Biggs stated that he expected shortly to ask for leave to file same, we are now asking that we be supplied with a copy of the proposed amendment or amended bill and notice of when the same will be presented to the Court.

Thanking you in advance, we are,

Yours very truly,

HUDSON, CREYKE & HUDSON,

RMH:S

By (s) RAYMOND M. HUDSON"

"Department of Justice
Washington, D. C.

July 12, 1938.

Messrs. Hudson, Creyke & Hudson,
404-8 Peoples Life Insurance Building
Washington, D. C.

Sirs:

Re: Northern Pacific land-grant case

This will acknowledge receipt of your letter of July 7, 1938. Owing to the illness of Judge Webster the signing of the decree in the above suit has been delayed. We hope to get the decree signed early in August.

Mr. Danly is now in Missoula, Montana, working in conjunction with Mr. Walter L. Pope in preparing findings of fact and conclusions of law and a form of decree.

The amendment to the bill has to do mainly with lands in the place limits of the grant which were in the Crow Indian Reservation, and have been patented to the company upon mineral base or have been selected by the company with mineral base assigned. This will be presented to the Court at the time of the hearing for entering the final decree. Judge Webster will be away from home during July and the date for hearing has not yet been fixed. I shall ask Mr. Danly to send you a copy of the proposed amendment.

Respectfully,
For the Attorney General,
(s) CARL McFARLAND,
Assistant Attorney General.

"July 18, 1938

United States v. Northern Pacific
No. E 4389 DCED Washington
CEC 174844

Carl McFarland, Esq.
Assistant Attorney General
Department of Justice
Washington, D. C.

My dear Mr. McFarland:

We wish to thank you for yours of the 12th in the above case, promising to send us a copy of the proposed amended bill or amendment to the bill, and to state that we will appreciate it if you will have this amendment and copy of the proposed decree and findings of fact sent a sufficient time before the date of presentation to enable us to file objections which we deem proper and to be present when the same is presented.

Thanking you in advance, we are

Yours very truly,
HUDSON, CREYKE & HUDSON,
RMH:S
By (s) RAYMOND M. HUDSON"

"Department of Justice
First National Bank Building
Missoula, Montana

July 28, 1938

Hudson, Creyke & Hudson,
Attorneys at Law
404-8 Peoples Life Insurance Bldg.
1343 H Street, N. W.
Washington, D. C.

Gentlemen:

A copy of your letter of July 18, 1938, addressed to Mr. Carl McFarland, Assistant Attorney General, has been forwarded to me here at Missoula.

Complying with your request that you be sent a copy of the proposed amendment to the bill of complaint, I am enclosing herewith copy of a stipulation which has been entered into by counsel for the Government and counsel for defendants and which contains the proposed amendment. The procedure outlined in the stipulation is, of course, subject to approval by the court. Mr. daPonte has sent the stipulation to Mr. McKevitt at Spokane for filing and has transmitted with it a proposed order. We are suggesting to Mr. daPonte that action on this stipulation be set down for hearing at the same time as the hearing on findings and decree.

The form of findings of fact and proposed decree has not been agreed to, and I am not

sure that counsel on both sides will reach an agreement as to their form. If proposed findings of fact, conclusions of law and decree are agreed to, I shall send you copies promptly. You will doubtless have notice of the time of hearing at which they will be presented to the court in time to be present and take such action as you may be advised is proper under the circumstances.

Respectfully,
(s) E. E. DANLY,
Enc. Special Assistant to Attorney General."

The action of the Northern Pacific Railway Company through its attorneys acting for the Northern Pacific Railroad Company in agreeing to the stipulation and having the decree entered, is another instance where the said railway company is acting to the prejudice, injury and harm of the railroad company while completely holding the railroad company in captivity.

The prayer "4a" in the amendment to the amended bill is in violation of the statute and the fact assumed that the railway company is the owner of the property and the only one with whom the Government is to deal or take into consideration is in direct violation of the Act of June 25, 1929.

Because these Movants were prevented from filing these objections to the granting of leave to amend the amended bill as stated in the stipulation before the decree was entered and because the Government

should not be permitted to amend the bill without complying with the mandate of the statute, the foregoing motion should be granted.

ROBERT L. EDMISTON,
Spokane, Wash.,
THOMAS BOYLAN,
RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,
Attorneys for Movants.

ATTORNEY'S CERTIFICATE

I, Robert L. Edmiston, hereby certify that I am one of the attorneys of record for Charles E. Schmidt, et al, intervening Minority Stockholders of the defendant Northern Pacific Railroad Company in the above entitled action; that I have read the foregoing Motion with the letters made a part thereof; that to the best of my knowledge, information and belief, there is good ground to support it; that it is not intended for delay; that the letters set out therein are true copies of the originals thereof, abiding with respective addressee.

Dated at Spokane, Washington, this 29th day of August, 1938.

ROBERT L. EDMISTON
Attorney for Intervening Petitioners,
Spokane, Washington.

RETURN OF SERVICE

State of Washington,
County of Spokane—ss.

Robert L. Edmiston being duly sworn on oath says: that affiant, is one of the attorneys of record for Charles E. Schmidt, et al., minority stockholders of the Northern Pacific Railroad Company, intervening petitioners in the above entitled action;

That affiant served the Motion to which this return is attached, comprising seven pages and Attorney's Certificate including pages designated as page 2-a and page 2-b, on the above named plaintiff, United States of America, by delivering to and leaving with Sam M. Driver, Attorney of record for said plaintiff, full, true copy thereof, in the city and county of Spokane, State of Washington, on this 29th day of August, A. D. 1938;

That affiant served said Motion upon the above named defendants by delivering to and leaving with Francis J. McKevitt, an Attorney of record for said defendants, in said cause, two true full copies thereof, in the city and county of Spokane, State of Washington, on the 29th day of August, A. D. 1938.

ROBERT L. EDMISTON

Subscribed and sworn to before me this 29th day of August, 1938.

[Seal] JOSEPH F. MORTON
Notary Public in and for the State of Washington, residing at Spokane, Wash.

CERTIFIED COPY

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court in and for the Eastern District of Washington, do hereby certify that the annexed and foregoing is a true and full copy of the original Motion to Strike Out Stipulation, Amendment to Amended bill and Prayer, and to Vacate and Modify the Decree of August 1, 1938, filed August 29, 1938, in cause entitled U. S. A. vs. N. P. Ry. Co., et al, No. E-4389, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Spokane this 29th day of August, A. D. 1938.

[Seal] A. A. LaFRAMBOISE,
Clerk

By.....
Deputy Clerk

[Endorsed]: Filed in the U. S. District Court Aug. 29, 1938.

[Endorsed]: Filed U. S. C. C. A. Aug. 31, 1938.

United States Circuit Court of Appeals
for the Ninth Circuit

8893

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, et al.,
Defendants,

CHARLES E. SCHMIDT, et al.,
Intervening Petitioners.

ORDER

The petition of Charles E. Schmidt, et al, for leave to appeal from that portion of the order of March 9, 1938, denying leave to intervene, is granted; in so far as it requests leave to appeal from other portions of the order of March 9, 1938, and from other orders is denied; cost bond fixed at $500; no supersedeas allowed.

Dated July 5, 1938.

CURTIS D. WILBUR
Senior United States Circuit Judge

[Endorsed]: Filed Jul. 8, 1938. Paul P. O'Brien, Clerk.

In the District Court of the United States for the Eastern District of Washington, Northern Division

In Equity No. E-4389

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, as reorganized in 1875,
NORTHWESTERN IMPROVEMENT COMPANY, a corporation,
BANKERS TRUST COMPANY, a corporation,
GUARANTY TRUST COMPANY, a corporation,
CITY BANK FARMERS TRUST COMPANY, a corporation,

Defendants,

CHARLES E. SCHMIDT, et al.,

Intervening Petitioners.

COST BOND ON APPEAL FOR INTERVENING APPELLANTS

Know All Men by These Presents:

That the Fidelity and Deposit Company of Maryland, a corporation, organized under the laws of the

State of Maryland, and authorized to transact in the State of Washington the business of entering into undertakings such as that evidenced by this contract, is held and firmly bound unto the United States of America, Plaintiff named above, and Northern Pacific Railway Company, a corporation, and other defendants above named, in the just and full sum of Five Hundred ($500.00) Dollars, for which sum, well and truly to be paid, it binds itself, its successors and assigns, firmly by these presents.

Sealed with its seal and dated this 24 day of May, 1938.

The condition of this obligation is such that whereas, on or about May 24th, 1932, October 3, 1935, January 29, 1936, March 9, 1938, and March 22 1938, appealable decrees were made and entered in the above entitled court and cause; and

Whereas, the Intervening Petitioners, Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal, and Walter L. Haehnlen, on behalf of themselves and all other minority stockholders of the Northern Pacific Railroad Company, have petitioned for and been allowed by the above court, an appeal to the United States Circuit Court of Appeals for Ninth Circuit, at San Francisco, California, from said decrees, and a citation has been issued directed to the said plaintiff and other defendants, citing them to appear in the said United States Circuit Court of Appeals for Ninth Circuit thirty (30) days from and after the date of such citation,—

Now, therefore, the condition of this obligation is such that if the said appellants shall prosecute said appeal to effect, and answer all costs, if they fail to make good their plea, then the above obligation to be void, otherwise to remain in full force and virtue.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND
By LAWRENCE BRUNETTS
Attorney-in-fact

Attest:
M. S. McCREA
Agent

The foregoing undertaking approved by the Court this ..... day of May, 1938.

CURTIS D. WLIBUR
Senior Circuit Judge of the United States Circuit Court of Appeals for 9th Circuit

Due and timely service of the foregoing Bond by receipt of a true copy thereof acknowledged this ..... day of May, 1938.

.....
Attorneys for Plaintiff, Appellee

.....
Attorneys for Defendant, Appellees

[Endorsed]: Filed U. S. C. C. A. July 19, 1938.

CITATION ON APPEAL

United States of America—ss.

The President of the United States of America

To United States of America, Plaintiff, and Northern Pacific Railway Company, a Corporation, Northern Pacific Railroad Company, a Corporation, Northern Pacific Railroad Company, as Reorganized in 1875, Northwestern Improvement Company, a Corporation, Bankers Trust Company, a Corporation, Guaranty Trust Company, a Corporation, City Bank Farmers Trust Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Charles E. Schmidt, George Landell, Executor of E. A. Landell, Deceased, Clarence Loebenthal, Trustee of Bernard Loebenthal, and Walter L. Haehnlen, Intervening Petitioners on behalf of themselves and other minority stockholders of the Northern Pacific Railroad Company, are appellants, and you are appellees, to show cause, if any there be, why that portion of the order rendered on March 9, 1938, against the said appellant, denying leave to intervene, as in the said order allowing appeal mentioned, should

not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Curtis D. Wilbur, Senior United States Circuit Judge for the Ninth Judicial Circuit this 18th day of July, A. D. 1938.

CURTIS D. WILBUR
Senior United States Circuit Judge

[Endorsed]: U. S. C. C. A. July 23, 1938.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 8893

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, et al.,
Defendants,

CHARLES E. SCHMIDT, et al.,
Intervening Petitioners.

RETURN OF SERVICE OF CITATION

State of Washington,
County of Spokane—ss.

Robert L. Edmiston being duly sworn on oath says: that affiant is one of the attorneys of record for the Intervening Petitioners in the above en-

titled action, a citizen of the United States, residing in the City of Spokane, State of Washington, over the age of twenty-one (21) years, and competent to be a witness in the above entitled action; that affiant served the Citation issued in the above entitled action July 18th, 1938, by Curtis D. Wilbur, Senior United States Circuit Judge, and therewith served the Order made by said Judge in said proceeding dated July 5th, 1938, and also therewith served a true copy of the Order of March 9th, 1938, made by the Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division, upon the above named plaintiff, United States of America, by delivering to and leaving with Sam M. Driver, one of the attorneys of record for plaintiff, in the above entitled action, in the City and County of Spokane, State of Washington, two true copies thereof, each duly certified by affiant to be true copies thereof.

That affiant served said Citation together with a copy of said Order of Judge Wilbur of July 5th, 1938, and also a true copy of the Order of March 9th, 1938, issued in the said District Court, by delivering to and leaving with Francis J. McKevitt, one of the attorneys of record for the above named defendants, three true copies of said Citation, and Orders, same being certified by Robert L. Edmiston to be true copies of the originals thereof in the City and County of Spokane, State of Washington, on the 21st day of July, A. D. 1938.

ROBERT L. EDMISTON

Subscribed and sworn to before me this 21st day of July, A. D. 1938.

[Seal] ALBERT H. SUNDAHL,
Notary Public in and for the State of Washington, residing at Spokane, Wash.

[Endorsed]: Filed U. S. C. C. A. July 23, 1938.

[Title of Circuit Court of Appeals and Cause.]

ORDER.

The petition of Charles E. Schmidt, et al. for leave to appeal from that portion of the order of March 9, 1938, denying leave to intervene, is granted; in so far as it requests leave to appeal from other portions of the order of March 9, 1938, and from other orders is denied; cost bond fixed at $500.; no supersedeas allowed.

Dated July 5, 1938.

CURTIS D. WILBUR,
Senior United States Circuit Judge.

[Endorsed]: Order allowing appeal, etc. Filed July 8, 1938. Paul P. O'Brien, Clerk.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

[Title of Cause.]

ORDER DENYING LEAVE TO INTERVENE AND STRIKING ANSWER AND CROSS-BILL.

On this day the motions of plaintiff and defendants Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company, to strike from the files the document entitled, "Answer and Cross Bill of the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders of said Railroad Company", and the motion of said parties for leave to file and serve said document, having been heard, it is ordered that the motion of the plaintiff and of said defendants to strike said above described document from the files, be, and the same is hereby, granted, and the said motion for leave to file and serve said document be and the same is hereby denied.

The motion of Walter L. Haehnlen and others for leave to file intervening petition attached to said motion, having come on to be heard, it is ordered that the said motion be, and the same is, hereby denied, and said petition of Charles E. Schmidt and other stockholders of the Northern Pacific Railroad Company to intervene on their own behalf and on behalf of all other stockholders similarly situated,

be, and the same is hereby stricken from this cause.

"Motion of the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and of said Charles E. Schmidt and others, minority stockholders, petitioners, to construe, modify and/or amend the report of the Special Master Graves filed July 26, 1937", coming on to be heard, it is ordered that said motion be, and the same is hereby denied.

That certain document entitled, "Joinder of the Northern Pacific Railroad Company by Charles E. Schmidt and Others, minority stockholders, and of said Charles E. Schmidt and others, minority stockholders, petitioners, in the two motions filed to re-refer the report to the Special Master", and that certain document entitled, "Exceptions of Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and of said Charles E. Schmidt and others, minority stockholders, petitioners, to the report of Special Master Graves filed July 26, 1937", having come on to be heard, it is ordered that the same be, and they are hereby stricken from the files in this cause.

"Motion on behalf of the said Northern Pacific Railroad Company for an extension of time to file exceptions to the Special Master's Report filed July 26th, 1937", having come on to be heard, it is ordered that the same be, and it is hereby stricken from the files in this cause.

It is further ordered, that this order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell,

deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves, to assert in any other proceeding any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition.

Exception is allowed the Petitioners in intervention to all of the rulings above.

Dated at Spokane, Wash.
March 9, 1938.

J. STANLEY WEBSTER,
District Judge.

[Endorsed]: Filed March 9, 1938.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8893.

CHARLES E. SCHMIDT, ET AL., MINORITY STOCKHOLDERS OF N. P. R. R. CO., INTERVENING PETITIONERS,
Appellants,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, ET AL.
Appellees.

DESIGNATION OF THE RECORD.

Now come the appellants and designate the following documents in the record on appeal which the clerk will print:

1. Bill of Complaint filed July 31, 1930 and Exhibits "M" and "N" to said Complaint.

2. Voluntary Appearance of Defendants filed September 10, 1930.

3. Appearance of Attorneys for Northern Pacific Railway Company filed December 5, 1930.

4. Stipulation of Amendments to Bill of Complaint filed June 25, 1931.

5. Order approving stipulation covering amendments filed June 25, 1931.

6. Amended and Supplemental Answer of Defendant Northern Pacific Railway Company filed July 18, 1931.

7. Request for hearing on points of law by Northern Pacific Railway Company and N. W. Improvement Company filed July 18, 1931.

8. Disclaimer of Northern Pacific Railroad Company filed January 18, 1932.

9. Plaintiff's motion to strike Disclaimer of Northern Pacific Railroad Company filed February 13, 1932.

10. Answer of Northern Pacific Railroad Company filed May 9, 1932.

11. Request for hearing on points of law by Northern Pacific Railroad Company filed May 9, 1932.

12. Order of reference to Special Master of May 24, 1932.

13. Special Master's first Report filed May 31, 1933.

14. Exceptions of Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed June 20, 1933 to First Report of Special Master.

15. Plaintiff's Exceptions filed July 8, 1933 to First Report of Special Master.

16. Order of compensation to Special Master dated January 25, 1934.

17. Memorandum Opinion of Court on Exceptions to Special Master's First Report filed September 9, 1935.

18. Order pursuant to opinion on Exceptions to Special Master's First Report dated October 3, 1935.

19. Order of January 29, 1936 amending order dated October 3, 1935.

20. Order of April 21, 1936 for further reference to Special Master Graves.

21. Appearance of L. B. daPonte for Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed July 22, 1937.

22. Special Master's Second Report filed July 26, 1937.

23. Exceptions of Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed August 9, 1937 to the Master's Second Report.

24. Supplemental Exceptions of Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed August 11, 1937 to Master's Second Report.

25. Plaintiff's Exceptions filed August 13, 1937 to Master's Second Report.

26. Motion of Minority Stockholders of Northern Pacific Railroad Company filed August 25, 1937 for extension of time to file Exceptions to Master's Second Report.

27. Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders filed September 3, 1937.

28. Plaintiff's Motion filed September 13, 1937 to Strike Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders.

29. Motion of Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed September 15, 1937 to strike Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders.

30. Motion of Minority Stockholders of Northern Pacific Railroad Company for leave to file Petition in intervention filed January 31, 1938.

31. Intervening Petition filed with said Motion January 31, 1938.

32. Appearance of counsel for Northern Pacific Railroad Company by Minority Stockholders filed February 14, 1938.

33. Appearance of counsel for Minority Stockholders as intervening Petitioners filed February 14, 1938.

34. Motion of Northern Pacific Railroad Company by Minority Stockholders to construe, modify

and amend filed February 19, 1938, the Second Report of Special Master.

35. Exceptions filed February 19, 1938 of Northern Pacific Railroad Company by Minority Stockholders, and of Minority Stockholders—Intervening Petitioners—to Second report of Special Master.

36. Order of March 9, 1938 denying leave to intervene and striking Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders.

37. Petition of Northern Pacific Railroad Company by Minority Stockholders filed March 11, 1938 to review and amend order of March 9, 1938.

38. Petition of Minority Stockholders—Intervening Petitioners—filed March 11, 1938 to review and amend order of March 9, 1938.

39. Motion of Northern Pacific Railroad Company by Minority Stockholders filed March 17, 1938 to dismiss original and amended Bill of Complaint.

40. Order of March 22, 1938 denying petitions to review and amend order of March 9, 1938.

41. Order of March 22, 1938 on Exceptions to Master's Second Report—sustaining some, denying others.

42. Assignment of Errors of Northern Pacific Railroad Company by Minority Stockholders filed March 22, 1938 being No. 42 in clerk's certificate.

43. Amendment to Assignment of Errors of Northern Pacific Railroad Company by Minority Stockholders filed March 25, 1938, being No. 43 clerk's certificate.

44. Assignment of Errors of Minority Stockholders—Intervening Petitioners filed March 22, 1938, being No. 49 Clerk's Certificate.

THOMAS BOYLAN,
RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,
ROBERT L. EDMISTON,
Attorneys for Appellants.

[Title of Circuit Court of Appeals and Cause.]

RETURN OF SERVICE OF DESIGNATION OF RECORD.

State of Washington,
County of Spokane—ss.

Robert L. Edmiston being duly sworn on oath says: that affiant is one of the attorneys of record for the above named appellants, a citizen of the United States, residing in the City of Spokane, State of Washington, over the age of twenty-one (21) years, and competent to be a witness in the above entitled action;

That affiant served the Designation of the record upon Appellee-plaintiff, United States of America, on the 30th day of July, A. D. 1938, by delivering to and leaving with Sam M. Driver, two full true copies thereof, in the city and county of Spokane, State of Washington;

That affiant served the Designation of the Record of Appellants in the above entitled proceeding on the 30th day of July, A. D. 1936, by delivering to and leaving with Francis J. McKevitt, Attorney of Record for appellees, other than plaintiff United States of America, two full true copies thereof, in the City and County of Spokane, State of Washington; original of which Designation of Record as served is hereto attached and made a part hereof.

ROBERT L. EDMISTON.

Subscribed and sworn to before me this 30th day of July, 1938.

[Seal] JOSEPH F. MORTON.

Notary Public in and for the State of Washington. Residing at Spokane, Wash.

[Endorsed]: Filed U. S. C. C. A. Aug. 5, 1938.

[Endorsed]: No. 8893. United States Circuit Court of Appeals for the Ninth Circuit. Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, Trustee of Bernard Loebenthal, and Walter L. Haehnlen, intervening petitioners on behalf of themselves and other minority stockholders of the Northern Pacific Railroad Company, vs. United States of America and Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, Northern Pacific Railroad Company, as reorganized in 1875, Northwestern Improvement Company, a corporation, Bankers Trust Company, a corporation, Guaranty Trust Company, a corporation, City Bank Farmers Trust Company, a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Filed August 5, 1938.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.